SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 613

INLAND EMPIRE DISTRICT COUNCIL, LUMBER AND SAW MILL WORKERS UNION, LEWISTON, IDAHO, ET AL., PETITIONERS,

vs.

HARRY A. MILLIS, INDIVIDUALLY AND AS CHAIRMAN AND MEMBER OF THE NATIONAL LABOR RELATIONS BOARD, ET AL., ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 10, 1945.

—5949

[fol. 1]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 23547

INLAND EMPIRE DISTRICT COUNCIL, LUMBER AND SAWMILL WORKERS UNION, Lewiston, Idaho; Local 2679, Lumber and Sawmill Workers Union, Bovill, Idaho; Local 2664, Lumber and Sawmill Workers Union, Clearwater, Idaho; Local 2766, Lumber and Sawmill Workers Union, Potlatch, Idaho; Local 2684, Lumber and Sawmill Workers Union, Lewiston, Idaho; Local 2923, Lumber and Sawmill Workers Union, Coeur d'Alene, Idaho; and Harry Haines, Potlatch, Idaho, Individually and as President of Inland Empire District Council, Plaintiffs,

—vs.

HARRY A. MILLIS, Rochambeau Building, Washington, D. C., Individually and as Chairman and Member of The National Labor Relations Board, Gerald D. Reilly, Rochambeau Building, Washington, D. C., Individually and as Member of the National Labor Relations Board, and John M. Houston, Rochambeau Building, Washington, D. C., Individually and as Member of the National Labor Relations Board, Defendants

COMPLAINT FOR INTERLOCUTORY AND PERMANENT INJUNCTION, DECLARATORY JUDGMENT AND INCIDENTAL RELIEF—Filed March 21, 1944

Now come the above named plaintiffs, by Wettrick, Flood and O'Brien and George E. Flood, their attorneys, and for cause of action against the defendants allege that:

1. Inland Empire District Council, Lumber and Sawmill Workers Union, is a labor organization within the meaning and purview of an Act of Congress, entitled the "National Labor Relations Act", 49 Stat. 449, and is affiliated with the [fol. 2] American Federation of Labor, and its membership comprises all of the local unions herein joined as parties plaintiff.

2. The plaintiff, Local 2679, Lumber and Sawmill Workers Union, Bovill, Idaho, is a labor organization within the

meaning and purview of the National Labor Relations Act, is affiliated with the American Federation of Labor, and admits to membership all persons engaged in logging operations.

3. The plaintiff, Local 2664, Lumber and Sawmill Workers Union, Clearwater, Idaho, is a labor organization within the meaning and purview of the National Labor Relations Act, is affiliated with the American Federation of Labor, and admits to membership all persons engaged in logging operations.

4. The plaintiff, Local 2923, Lumber and Sawmill Workers Union, Coeur d'Alene, Idaho, is a labor organization within the meaning and purview of the National Labor Relations Act, is affiliated with the American Federation of Labor, and admits to membership all persons engaged in sawmill operations.

5. The plaintiff, Local 2766, Lumber and Sawmill Workers Union, Potlatch, Idaho, is a labor organization within the meaning and purview of the National Labor Relations Act, is affiliated with the American Federation of Labor, and admits to membership all persons engaged in sawmill operations, and employees of Washington-Idaho-Montana Railroad, a subsidiary railway corporation.

6. The plaintiff, Local 2684, Lumber and Sawmill Workers Union, Lewiston, Idaho, is a labor organization within the meaning and purview of the National Labor Relations Act, is affiliated with the American Federation of Labor, and admits to membership all persons engaged in sawmill operations.

7. The plaintiff, Harry Haines, is the President of the said plaintiff Inland Empire District Council, and of the plaintiff Local 2766, Lumber and Sawmill Workers Union, residing at Potlatch, Idaho.

8. One of the principal purposes and functions of the said Inland Empire District Council and of the labor unions plaintiffs herein is to represent employees for the purpose of collective bargaining with employers, and to organize workers for their mutual aid and protection. The plaintiffs [fol. 3] herein transact business exclusively within the State of Idaho, and the plaintiff, Harry Haines, resides within the State of Idaho.

9. The National Labor Relations Board, hereinafter called the Board, is an agency of the United States Government created by the National Labor Relations Act, with offices at Washington, in the District of Columbia, and the defendant, Harry A. Millis, is Chairman and a member of said Board and resides in the District of Columbia. The defendants, Gerald D. Reilly and John M. Houston, are members of the Board and reside in the District of Columbia.

10. The said Inland Empire District Council is fairly representative of the local unions comprising its membership, and said local unions herein joined as parties plaintiff are fairly representative of their membership, and the total membership of said local unions is in excess of 4,000. This action is brought in behalf of the labor organizations and persons joined as parties plaintiff on behalf of all members of the said local unions.

11. The sum in controversy between plaintiffs and said defendants exceeds the sum of Ten Thousand ($10,000) Dollars, exclusive of interest and costs.

12. The International Woodworkers of America is an organization affiliated with the Congress of Industrial Organizations, and Locals 10-358, 10-361, and 10-364 are local unions affiliated with said International Woodworkers of America, operating and doing business within the State of Idaho.

13. Potlatch Forests, Inc., is a corporation engaged in lumbering and sawmill operations within the State of Idaho, and has plants and/or camps at Bovill, Headquarters, Coeur d'Alene, Potlatch and Lewiston, in the State of Idaho, and the individual members of the local unions herein joined as parties plaintiff are employees of said Potlatch Forests, Inc. The five plants or operations of the Company are known as the Potlatch Unit Plant, located at Potlatch, Idaho; the Rutledge Unit Plant, located at Coeur d'Alene, Idaho; the Clearwater Unit Plant, located at Lewiston, Idaho; the Bovill Logging Department, located at Bovill, Idaho; and the Clearwater Logging Department, located at Headquarters, Idaho.

14. On the 9th day of March 1943, the said Locals 10-358, 10-361, and 10-364, affiliated with the International Wood- [fol. 4] workers of America and the Congress of Industrial

Organizations, filed with the National Labor Relations Board petitions for investigation and certification as collective bargaining representative in each of three separate operations of the Company, said three separate units to consist of the production and maintenance employees at the Clearwater Unit plant, the Bovill Logging Department, and the Clearwater Logging Department. A hearing was held on said petitions at Lewiston, Idaho, on the 14th day of May 1943, before a Trial Examiner appointed by the Board.

15. At said hearing the petitioning local unions affiliated with the Congress of Industrial Organizations appeared and presented evidence and argument in support of said petitions, and the plaintiffs herein, affiliated with the American Federation of Labor, appeared and presented evidence and argument in opposition to said petitions, and resisted the same upon the principal ground that the three separate units sought by the petitioners were inappropriate.

16. Thereafter, on the 13th day of July 1943, the Board issued its decision and order, including findings of fact, by which it decided that the three separate units composed of three of the five separate operations of the Company were inappropriate for the purposes of collective bargaining, and that no question concerning representation for the purposes of collective bargaining had arisen within an appropriate unit, and therefore dismissed the petitions for certification.

17. Thereafter, on July 16, 1943, the Congress of Industrial Organizations, through its affiliated unions, filed with the Board a new petition requesting certification as a bargaining representative in a new and different unit to be composed of the production and maintenance employees of Potlatch Forests, Inc., at all five of its aforesaid operations, but excluding clerical supervisory, Potlatch Townsite, Potlatch Mercantile Company, confidential and temporary employees, said unit to be a single unit composed of employees of all five operations of the Company.

18. Thereafter, on August 11, 1943, the Congress of Industrial Organizations filed with the Board a motion requesting that the record made pursuant to said dismissed [fol. 5] petitions in Cases numbered R-5373 and R-5374

be reopened and considered as part of the record in support of said new petition in Case numbered 19-R-1164, and that an election be directed among the employes in the proposed new unit composed of all five operations of the Company without the holding of a hearing, or, in the alternative, that the record in Cases numbered R-5373 and R-5374 be incorporated in Case numbered 19-R-1164, and that an election be directed.

19. On September 14, 1943, the Board issued a notice to show cause why (1) the Decision and Order in Cases numbered R-5373 and R-5374 should not be vacated; (2) the petitions in those cases should not be reinstated; (3) the petition in Case numbered R-19-1164 should not be made a part of the record in Cases numbered R-5373 and R-5374 and considered an amendment to the petitions in said cases; (4) the statement of the Field Examiner concerning claims of authorization for the purpose of representation in Case numbered 19-R-1164 should not be made a part of the record in Cases numbered R-5373 and R-5374; and (5) the Board should not reconsider the Decision and Order in Cases numbered R-5373 and R-5374 as thus supplemented and proceed to a new decision without further hearing. Thereafter, the plaintiffs filed with the Board their protest and objections to the proposed action of the Board, on the ground that such action would deprive plaintiffs of an appropriate hearing and opportunity to present evidence, and would in other respects be violative of the right of plaintiffs to a fair hearing on the new issues raised by said new petition in case numbered 19-R-1164, and that such procedure was contrary to law and particularly in violation of Section 9 (c) of the National Labor Relations Act, which is as follows:

> "Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or [fol. 6] utilize any other suitable method to ascertain such representatives."

20. On the 14th day of October 1943, the Board, without providing for a hearing on said new petition (Case No. 19-R-1164), over the objection of plaintiff unions, arbitrarily and capriciously issued its decision and direction of election, wherein it vacated its former decision and order of dismissal in consolidated Cases numbered R-5373 and R-5374, reinstated the petitions in those cases, made the new petition in Case numbered 19-R-1164 a part of the record in those cases, treated it as an amendment to the petitions in those cases, made the "Statement of Field Examiner concerning claims of authorization for the purpose of representation" and the "Revised Statement of Field Examiner concerning claims of authorization for the purpose of representation" in said new Case numbered 19-R-1164 a part of the record in those cases, found that a question affecting commerce had arisen concerning the representation of employees of Potlatch Forests, Inc., within the meaning of Section 9 (c) and Section 2 (6) and (7) of the National Labor Relations Act; that

> "all production and maintenance employees of the Company at its five operations, including scalers, and railroad employees at the logging operations who are not employees of the Washington-Idaho-Montana Railroad, but excluding all supervisory employees with authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees, or effectively recommend such action, store employees, armed and militarized guards and watchmen, clerical employees, confidential employees, employees of Potlatch Mercantile Company, employees of the Townsite Department, foresters, and temporary employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act,"

and ordered that the question concerning representation be resolved by an election by secret ballot among the employees in said unit.

[fol. 7] 21. In said decision and direction of election, the Board acted arbitrarily and capriciously in that (a) the Board treated the petition in case numbered 19-R-1164 as an amendment to the petitions in said dismissed Cases numbered R-5373 and R-5374, and proceeded to a decision

and direction of election without a hearing or notice of hearing, notwithstanding that such amendment introduced new and substantially different and inconsistent issues from those involved in the prior hearing held on May 14, 1943, in Cases numbered R-5373 and R-5374; (b) the Board failed and refused to grant a hearing on said new petition, contrary to the provisions of Section 9 (c) of the National Labor Relations Act, and contrary to the provisions of Article III, Section 3, of the Rules and Regulations promulgated by the National Labor Relations Board, which is in part as follows:

> "SEC. 3. If it appears to the Board that an investigation should be instituted it shall so direct and (except as provided in Section 10 of this Article) shall authorize the Regional Director to undertake such investigation and to provide for an appropriate hearing upon due notice, either in conjunction with a proceeding instituted pursuant to Section 5 of Article II of these Rules and Regulations, or otherwise, . . .;"

(c) in that the Board vacated its former decision dismissing such Cases numbered R-5373 and R-5374, and found that a question of representation had arisen without conducting a hearing to determine such question, and determined the appropriate unit and ordered an election in such unit, although no election had been sought in such unit and was not an issue until the filing of the petition in Case numbered 19-R-1164, long after the hearing of May 14, 1943, held in Cases numbered R-5373 and R-5374.

21(a). By treating the new petition filed after the hearing as an amendment, the Board introduced new and different issues upon which no hearing had been afforded as follows:

> (a) Whether a question concerning representation within the meaning of the National Labor Relations Act had arisen in a collective bargaining unit com- [fol. 8] posed of employees in all five plants or operations of the company as described in Paragraph 20 hereof, and whether such question should be resolved by an election. At the hearing the issue was whether such question of representation had arisen in three

separate units composed of employees in only three of said plants or operations.

(b) At the time of the hearing no issue had been raised concerning representation of employees in the Potlatch Unit Plant, or in the Rutledge Unit Plant. In connection with these two plants, classifications of employees were involved which had no counterpart in any other operations of the Company, but the Board assumed to exclude and did arbitrarily exclude those employees from the appropriate unit and from participation in the subsequent election without affording a hearing on such issues prior to the election. Among such employees were: Potlatch Townsite and Potlatch Mercantile Company employees. Further, plaintiffs had no opportunity at the hearing prior to the election to present evidence concerning employees of Washington-Idaho-Montana Railroad and the question of whether they should be permitted to participate in the election and be included in the five-plant unit.

(c) By adopting new issues, plaintiffs were deprived of the right to present evidence and argument in support of its contention that several hundred of its members employed at the Potlatch Unit Plant and the Rutledge Unit Plant, temporarily absent in the military service but with full seniority preserved, should be permitted to vote. These employees absent in military service were not involved in the only hearing held prior to the election.

These and other objections were raised by plaintiffs by their motion to reconsider and vacate the decision and direction of election and to vacate and set aside the election. The denial of a fair and appropriate hearing on such questions was not and could not be cured by the granting and holding of a hearing on February 18 and 19, 1944, which was more than three months after the holding of the election.

[fol. 9] 22. Thereafter, on November 9, 10, 11, and 12, 1943, pursuant to its decision and order of election, the board conducted an election among the employees in said unit under the direction of its Regional Director for the Nineteenth Region who issued his report on ordered elec-

tion, giving among other things the results of said election as follows:

Approximate number of eligible voters, 2,886.

Count of Ballots:

Total ballots cast	2,178
Total ballots challenged	83
Total void ballots	3
Total valid votes counted	2,092
Total votes cast for International Woodworkers of America, C. I. O.	1,118
Total votes cast for Inland Empire District Council, Lumber and Sawmill Workers Union, A. F. L.	953
Total votes cast for Neither	21

The number of ballots cast for the International Woodworkers of America, C. I. O., although a majority of those voting, was substantially less than 50% of those eligible to vote, and the Regional Director recommended that the Board certify the International Woodworkers of America, C. I. O.

23. Thereafter, the plaintiff unions, affiliated with the American Federation of Labor, filed objection to the election and instituted a suit in this Court for injunction to prevent such certification, being Civil Action No. 22,353, which was dismissed on or about the 21st day of December 1943, on the ground that plaintiffs had not exhausted their administrative remedies.

24. Thereafter, the plaintiffs filed with the National Labor Relations Board a motion to reconsider and vacate the decision and direction of election, to vacate the election, stay certification of representatives, and grant an appropriate hearing. Pursuant thereto, the Board, on January 27, 1944, ordered that a hearing be held to adduce evidence with respect to the issues raised by the last said motion and objections to the election, and further ordered that ruling on that portion of plaintiffs' motion, requesting that the decision and direction of election and the election be vacated, be deferred until the Board reconsidered the entire record, including evidence to be adduced at such further hearing.

[fol. 10] 25. In accordance with said order, a hearing was held before a Trial Examiner on February 18th and 19th, 1944, which was participated in by the parties, and on March 4, 1944, the Board rendered a supplemental decision and certification of representatives, in which it denied the said motion of plaintiff unions to vacate said decision and direction of election, and proceeded to certify the C. I. O. as the exclusive representative of the employees in the appropriate unit. On March 8, 1944, plaintiff unions filed a motion with the Board that it reconsider its supplemental decision and certification entered March 4, 1944, which motion has been denied. Said plaintiffs have exhausted their administrative remedies available herein.

26. The Board acted arbitrarily and in violation of law in resolving any question of representation which may have arisen by means of an election held November 9, 10, 11th, and 12, 1943, a time prior to the holding of a full and fair hearing on the issues raised by the petitions as amended, in rendering its supplemental decision and certification of representative on March 4, 1944, based upon the results of such election, and in denying plaintiffs' motion to reconsider and vacate its decision and direction of election and the election. By reason of the failure of the Board to provide an appropriate hearing upon due notice upon the issues as amended, as a condition precedent to the holding of a valid election for the purpose of resolving a question of representation, these plaintiff labor unions and their members were deprived of their right to an appropriate, fair and impartial hearing upon due notice as guaranteed by the National Labor Relations Act, and were deprived of property without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

27. The Inland Empire District Council and its affiliated local unions, plaintiffs herein, for many years last past have an exclusive collective bargaining cont-act with the Potlatch Forests, Inc., covering the terms and conditions of employment of all the employees involved herein; said contract was originally negotiated between parties thereto, and has been continued in force and effect by orders and directives of the National War Labor Board made May 10, 1943, and January 31, 1944, pursuant to its authority con-
[fol. 11] tained in the War Labor Disputes Act. By said

orders and directives, said contract shall remain in effect until a new exclusive bargaining agency is certified by the National Labor Relations Board, and except for the unlawful acts and certifications of representative by the National Labor Relations Board on March 4, 1944, herein complained of, said contract would continue in full force and effect.

28. The plaintiff labor organizations have existed and functioned for many years, and have accumulated valuable business and property rights which will be lost unless the relief herein sought is granted. The plaintiff labor unions, by reason of said unlawful actions, decisions and certification of representative, will suffer a great loss in membership and revenue, will be unable to represent the employees of Potlatch Forests, Inc., constituting their membership, for purposes of collective bargaining, will be unable to improve the terms and conditions of employment of said employees and to continue to represent them in matters involving back pay and other working conditions before the National War Labor Board. Plaintiffs have invested thousands of dollars in organizational expenses and in establishing local unions, which money and property will be lost. Plaintiffs will lose valuable contract rights existing between them and Potlatch Forests, Inc., will suffer a great loss of prestige and good will among present and future employees of Potlatch Forests, Inc., and by reason of such threatened loss of good will, membership, revenue, contractual rights and status as collective bargaining representative of such employees, are threatened with a termination of all their business activity.

29. Several hundred of the members of plaintiff unions are now in the military service of the United States, and such members have been continued as members in good standing, with all the rights and privileges of membership, and with the right to reinstatement and seniority in employment with said Company upon their return from military service, and such members in the military service, together with all other members of said unions employed by Potlatch Forests, Inc., are threatened with the loss of all their rights relating to employment, reemployment and seniority, as well as wages, working conditions and other benefits, as provided by contract.

[fol. 12] 30. The plaintiffs have no other plain, speedy or adequate remedy at law, and unless the defendants be temporarily and permanently enjoined as herein prayed, plaintiffs and their members will suffer great and irreparable loss, injury and damage.

Wherefore, plaintiffs pray that the Court cause appropriate process to issue against the defendants and each of them, and require the defendants to answer this bill of complaint as provided by the rules of this Court and by law.

Plaintiffs further pray that the defendants and each of them, and their successors in office, and all persons acting or claiming to act under their authority or by their direction be temporarily and permanently enjoined from refusing to vacate and withdraw the said order of certification of International Woodworkers of America, affiliated with the Congress of Industrial Organizations, as exclusive bargaining representative for the employees of Potlatch Forests, Inc., within said unit, and that the defendants be directed and required to withdraw such order of certification.

Plaintiffs further pray, without prejudice to and without waiving the foregoing prayer for relief, and in the alternative, that this Court make and enter herein its declaratory judgment and decree, decreeing and adjudging that said certification of the International Woodworkers of America, affiliated with the Congress of Industrial Organizations, as exclusive bargaining representative for the employees of Potlatch Forests, Inc., in said unit is invalid, in law void, and of no force or effect, for the reasons hereinbefore set forth.

Plaintiffs further pray for such other further and different relief as they may be entitled to receive.

Dated this — day of March, 1944.

Wettrick, Flood & O'Brien, (Sgd.) George E. Flood, 805-810 Arctic Building, Seattle 4, Washington. (Sgd.) Joseph A. Padway, (Sgd.) James A. Glenn, 736 Bowen Building, Washington 5, D. C., Attorneys for Plaintiff.

[fol. 13] *Duly sworn to by Harry Haines. Jurat omitted in printing.*

In United States District Court

Motion to Dismiss Complaint—Filed March 29, 1944

* * * * * * * * *

Now comes the defendants, Harry A. Millis, Gerard D. Reilly, and John M. Houston, individually and as members of the National Labor Relations Board, by their attorneys, and respectfully move the Court to dismiss the complaint herein upon the following grounds:

I. The United States District Court is without jurisdiction over the subject matter of this action. The plaintiffs pray for the issuance of a mandatory injunction requiring the defendants to set aside a certification of representatives made by them in their official capacities as members of the National Labor Relations Board and, in the alternative, for the entry of a declaratory judgment decreeing said certification invalid and void. In praying for such relief plaintiffs are in effect seeking a [fol. 14] review of said certification. The Act, however, does not provide for a review of Board proceedings concerning the investigation and certification of collective bargaining representatives until such time as the Board enters a final order based in whole or in part upon facts certified in such proceeding. It is for Congress to determine how the rights which it creates shall be remedied. The intent of Congress, as expressed in the Act and in the reports and debates on the bill which became the Act, clearly indicate that there was to be no judicial review except as set forth above. The District Court is therefore without jurisdiction to grant the relief sought by the complaint.

II. Even assuming that the Court has jurisdiction of the subject matter of this action, plaintiffs have failed in their complaint to make out a cause of action entitling them to the relief prayed for.

A. The complaint on its face fails to show that plaintiffs are threatened with or in any danger of suffering any great, irreparable, or immediate injury, or any injury cognizable in equity as a result of any action by the defendants.

1. The alleged injury or threatened injury of which plaintiffs complain is a consequence not of the Board's

certification of the International Woodworkers of America, which plaintiffs seek to have the Court set aside, but of the obedience of Potlatch Forests, Inc., to the command of the statute to bargain collectively with the representative of a majority of its employees in an appropriate bargaining unit. The certification is not an order but merely a statement of the Board's findings in a wholly investigatory proceeding. The certification does not command plaintiffs or anyone else to do or to refrain from doing anything. Not until after the Board has entered a bargaining order can plaintiffs be injured by any action of the defendants. Such an order can be entered only after a further proceeding under Section 10 (c) of the Act in which plaintiffs may, upon a proper showing of interest, intervene and contest the validity of any prior certification relied on by any of the parties. Should plaintiffs deem themselves aggrieved by a bargaining order entered pursuant to Section 10 (c) of the Act, they may petition an appropriate circuit court of appeals of the United States to review and set aside such order, pursuant [fol. 15] to Section 10 (f) of the Act. In said proceedings the validity of the certification would be reviewable by the circuit court of appeals, as provided in Section 9 (d) of the Act. Thus the procedure for administrative hearing and court review proscribed in the Act affords plaintiffs adequate safeguards against any unwarranted action on the part of the defendants capable of injuring plaintiffs.

B. The complaint fails to allege facts warranting the issuance of a mandatory injunction. Such an injunction is governed by the same principles as a writ of mandamus, and such relief will be granted only when the duty to act is clear and substantially ministerial. It will not be used to require repudiation of a decision reached in the exercise of judgment and discretion pursuant to valid authority.

C. The complaint fails to show any "actual controversy" within the meaning of the Federal Declaratory Judgments Act (48 Stat. 995, 28 U. S. C. A., Section 400), which would warrant the exercise of jurisdiction by this Court to declare rights as plaintiffs request it to do.

III. Even assuming that the Court has jurisdiction in this matter and that the plaintiffs otherwise have made out

a cause of action entitling them to the relief prayed for, such relief could not be granted without adversely affecting the rights of International Woodworkers of America, affiliated with the C. I. O., the union certified by the Board in the certification complained of. Plaintiffs' failure to join as a party and to secure service upon this indispensable party requires the dismissal of the complaint.

Respectfully submitted. (S) Alvin J. Rockwell, General Counsel. (S) Malcolm F. Halliday, Associate General Counsel. (S) Charles F. McErlean, (S) Owsley Vose, Attorneys for defendants.

Dated: March 29, 1944.

[fol. 16] In United States District Court

* * * * * * * *

Appearances: George E. Flood, Esq., Joseph A. Padway, Esq., and James A. Glenn, Esq., appearing for the Plaintiffs. M. F. Halliday, Esq., and Charles F. McErlean, Esq., appearing for the defendants.

Decision of the Court—Filed April 5, 1944

(Following the arguments of counsel:)

The Court. It is not necessary for the Court to take the matter under advisement. The Court is perfectly clear as to what the Court should do.

Of course, when this case comes before the Court for hearing it may appear the objections of the claimant here are trivial. The Court may find that when the hearing was held after the election that the hearing showed that everyone was allowed to vote at the election that would have been allowed to vote if a hearing had been held on the second petition, or it may hold that all the important factors involved are exactly what they would have been if the second hearing had been held.

The Court, in ruling as it is about to rule, is not, in any way, in any manner, or to any extent, of course, passing upon the merits of the controversy, but here is a situation where according to the complaint, and the complaint

states the facts in so far as the particular hearing is concerned—here is a case where the Board did not comply with the provisions of the Act in a very important particular, and the Court is asked to say by this motion that there is no way that the party who has been treated not in accordance with the law can obtain any relief from any source.

Now, the American Doctrine of Judicial Supremacy, of course, was declared by the Supreme Court at a very early date. It has never been challenged since. On the other hand, it is apparently gaining momentum. The Court realizes that that doctrine was used for over 100 years by the Supreme Court in the maintenance of property rights, and in almost—very largely I will say—in [fol. 17] disregard of the rights of the everyday individual.

Now, while, happily, that has not been the condition for several years past, while the Court now understands that the benefit of each class is furthered by justice to every class, the Supreme Court has not, in any manner, or to any extent, undertaken to modify the American Doctrine of Judicial Supremacy.

Now, under the American system, if the United States District Court hasn't any jurisdiction to grant relief in this case, then there is no relief that can be granted. You can't get relief anywhere. The Court has no doubt of its power and duty to entertain this complaint, and, of course, the Court wants to emphasize the fact, which is so often misunderstood, that the Court doesn't in any manner, or to any extent, undertake to pass on the merits, but the motion to dismiss, gentlemen, will have to be overruled.

(Thereupon, after further discussion as to time of filing the order, the hearing was, at 11:30 o'clock A. M., adjourned.)

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION TO DISMISS COMPLAINT—Filed April 5, 1944

* * * * * * *

Upon consideration of the Motion to Dismiss the Complaint, filed herein, and after oral argument upon the same, it is, by the Court, this 5th day of April 1944

Ordered, That the Motion to Dismiss the Complaint be, and the same is, hereby overruled in accordance with the oral Memorandum Opinion of the Court delivered on April 4th, 1944, with the right in the said defendants to answer said Complaint on or before the 22d day of May 1944.

(Sgd.) T. Alan Goldsborough, Justice.

Approved as to form:

(Sgd.) George E. Flood, (Sgd.) James A. Glenn, Attorneys for Plaintiffs. —— ——, Attorneys for Defendants.

[fol. 18] IN UNITED STATES DISTRICT COURT

NOTICE OF INTENTION TO APPLY FOR ALLOWANCE OF SPECIAL APPEAL—Filed April 5, 1944

* * * * * * * *

Notice is hereby given this 5th day of April, 1944, that Harry A. Millis, Gerard D. Reilly, and John M. Houston, individually and as Members of the National Labor Relations Board, defendants, intend to apply for allowance of a special appeal to the United States Court of Appeals for the District of Columbia from the Order of this Court entered on the 5th day of April, 1944, in favor of the above-named plaintiffs and against said defendants.

Alvin J. Rockwell, General Counsel; Malcolm F. Halliday, Associate General Counsel; Charles F. McErlean, Owsley Vose, Attorneys for defendants, 815 Connecticut Ave., N. W., Washington, D. C.

[fol. 19] In United States Court of Appeals for the District of Columbia, April Term, 1944

No. 8746

No. 23,547 Civil, District Court

Harry A. Millis, Individually and as Chairman and Member of the National Labor Relations Board, et al., Petitioners,

v.

Inland Empire District Council, Lumber and Sawmill Workers Union, et al., Respondents

Before Groner, C. J., and Miller and Edgerton, JJ.

Order Allowing Special Appeal, etc.—Filed May 16, 1944.

On consideration of petition for allowance of special appeal and the answer thereto filed in the above-entitled case, it is

Ordered by the court that a special appeal from the order of Mr. Justice Goldsborough entered on April 5, 1944, in the District Court in this cause be, and it is hereby, allowed. The application to reverse is denied, without prejudice, and the appeal set for argument on June 13, 1944.

Dated May 15, 1944.

A true Copy,

Test: (S.) Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia. (Seal.)

[fol. 20] Filed May 16, 1944. Charles E. Stewart, Clerk.

In United States District Court

[Title omitted]

Joint Designation of Record on Appeal

The appellants and appellees jointly designate the following as the record on special appeal herein:

1. The Complaint.

2. The Motion to Dismiss.

3. Order of April 5, 1944, Denying the Motion to Dismiss.
4. Transcript of Oral Opinion of Justice Goldsborough.
5. Notice of Intention to Apply for Special Appeal.
6. Order Allowing Special Appeal.
7. This Designation of Record.
8. Clerk's Certificate.

(S.) Joseph A. Padway, (S.) James A. Glenn, Attorneys for Plaintiffs (Appellees).

(S.) Alvin J. Rockwell, General Counsel, (S.) Malcolm F. Halliday, Associate General Counsel, (S.) Charles F. McErlean, Attorney, Attorneys for Defendants (Appellants).

Dated this 16th day of May 1944.

[fol. 21] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 21a] [Stamp:] United States Court of Appeals for the District of Columbia. Filed May 19, 1944. Joseph W. Stewart, Clerk.

[fol. 22] IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

* * * * * * * *

Before Honorable D. Lawrence Groner, Chief Justice, and Honorable Justin Miller, and Henry W. Edgerton, Associate Justices.

* * * * * * * *

No. 8716

HARRY A. MILLIS, Individually &c., et al., Appellants,

vs.

INLAND EMPIRE DISTRICT COUNCIL &c., et al., Appellees

MINUTE ENTRY—June 13, 1944

On motion of Mr. Joseph A. Padway, Mr. George E. Flood, a member of the Bar of the Supreme Court of Washington, was permitted to argue for appellee Inland Empire District Council, pro hac vice by special leave of Court.

Argument commenced by Mr. Charles F. McErlean, attorney for appellants, continued by Messrs. George E. Flood and Joseph A. Padway, attorneys for appellees, and concluded by Mr. Charles F. McErlean, attorney for appellants.

. . . . . .

[fol. 23] IN UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA

No. 8746

HARRY A. MILLIS, Individually and as Chairman and Member of the National Labor Relations Board, et al., Appellants,

v

INLAND EMPIRE DISTRICT COUNCIL, LUMBER AND SAWMILL WORKERS UNION, et al., Appellees

Special Appeal from the District Court of the United States for the District of Columbia

Argued June 13, 1944.—Decided July 24, 1944

Mr. Charles F. McErlean, National Labor Relations Board, with whom Messrs. Alvin J. Rockwell, General Counsel, and Malcolm F. Halliday, Associate General Counsel, both of the National Labor Relations Board, were on the brief, for appellants.

Mr. George E. Flood, member of the Bar of the Supreme Court of the State of Washington, pro hac vice, by special leave of Court, with whom Messrs. Joseph A. Padway and James A. Glenn were on the brief, for appellees.

Before Groner, C. J., and Miller and Edgerton, JJ.

OPINION—Filed July 24, 1944

EDGERTON, J.:

Appellee unions ask a mandatory injunction requiring appellants, the members of the National Labor Relations Board, to set aside a certification, following an election, of the collective bargaining representatives of certain em-

ployees of Potlatch Forests, Inc., a large logging and lumbering concern in Idaho. The complaint also asks for a declaratory judgment that the certification is void. It attacks the sufficiency of the hearings which the Board held in connection with the election. It states that the employer has bargained with appellee unions in the past and will be deterred by the Board's certificate from doing so in the future, and asserts that this will cause irreparable injury to appellees. The District Court declined to dismiss the complaint on appellants' motion. We think this was error. [fol. 24] The National Labor Relations Act authorizes judicial review of the Board's certification if, but only if, the Board finds unfair labor practices and makes its certification the basis of an order with respect to such practices. §§ 9 (d), 10 (c); 49 Stat. 453, 454; 29 U. S. C. §§ 159 (d) 160 (c). There is no such finding or order in this case. We think the statutory review is exclusive. In *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, 412, the Supreme Court expressly reserved the question whether the Board's mere certification of collective bargaining representatives could be reviewed in a suit like the present one. But we think the question is now foreclosed by *Switchmen's Union of North America* v. *National Mediation Board*, 320 U. S. 297, which held that the District Court had no power to review a similar certification of the National Mediation Board. *Reilly* v. *Millis*, — U. S. App. D. C. — (No. 8657, decided July 10, 1944); *Cf. Employers Group of Motor Freight Carriers, Inc.* v. *National War Labor Board*, — U. S. App. D. C. — (No. 8680, decided June 2, 1944).

Reversed.

Dissenting Opinion

Groner, C. J. dissenting:

The controversy here primarily concerns the employees of Potlatch Forests, Inc. That corporation is engaged in lumbering and sawmill operations in Idaho. It owns five plants, located miles apart, one at Lewiston, one at Coeur d'Alene, one at Potlatch, one at Boville and the other at Headquarters. Five labor unions, locals of the American Federation of Labor, had for years represented, respectively, the employees of these five operations.

In March, 1943, locals of the C. I. O. filed with the Labor Board petitions to be certified as the bargaining representa-

tive in three of the company's five plants. There was a hearing and the Board in July, 1943, found the units included inappropriate for collective bargaining and dismissed the petitions. A few days after dismissal the C. I. O. unions filed a new petition, requesting certification of the employees of all five operations in a single unit, and a month later followed this with a motion requesting that their petition be treated as an amendment to the former petitions, and that an order directing the holding of an election be entered by the Board. The Board, thereupon, without providing a hearing, and over the objection of the A. F. of L. unions, issued an order directing the holding of a general election. Accordingly an election was held, in which all present employees of all five plants, except certain excepted employees, voted, or might have voted, with the result that the C. I. O. secured the majority of those voting, which, it is claimed, however, was less than fifty per cent of those eligible to vote.

The complaint here alleges that—

"In said decision and direction of election, the Board acted arbitrarily and capriciously in that (a) the Board treated the petition in case numbered 19-R-1164 as an amendment [fol. 25] to the petitions in said dismissed Cases numbered R-5373 and R-5374, and proceeded to a decision and direction of election without a hearing or notice of hearing, notwithstanding that such amendment introduced new and substantially different and inconsistent issues from those involved in the prior hearing held on May 14, 1943, in Cases numbered R-5373 and R-5374; (b) the Board failed and refused to grant a hearing on said new petition, contrary to the provisions of Section 9 (c) of the National Labor Relations Act, and contrary to the provisions of Article III, Section 3 of the Rules and Regulations promulgated by the National Labor Relations Board, * * *."

Various other grounds are alleged tending to show capricious and arbitrary action on the part of the Board in the exclusion of certain classes of employees from the right to vote and in depriving of their votes several hundred temporary absentees in the military services, who, though absent for the time being, had retained full seniority rights.

The majority of this court now hold that the Labor Act does not authorize judicial review of the Board's certifica-

tion where the Board has not followed its certification with an order, and hence that since here there was no order, the decision of the District Court sustaining its jurisdiction was wrong. The effect of this is, as it appears to me, to recognize a right on the part of the Board, when it likes and as it likes, by withholding its order, to determine the right of judicial review,—a position which I think is wholly wrong and untenable and neither more nor less than a usurpation of power.

I am by no means unmindful of the extent to which the Supreme Court has gone in denying review in cases under the Railway Labor Act,[1] but I am by no means persuaded that because of this the Supreme Court will, when properly confronted, go equally as far in its interpretation of the Wagner Act. At least in the one case in which the question arose the Court expressly reserved consideration (308 U. S. 401, 412).

Here, as I have pointed out, appellees claim irreparable injury and a lack of due process as a consequence of the certification without a hearing. What support there is of this in the facts I have no means of knowing, but I think it is not an answer to the contention to say that Congress has denied to the courts of the country the right to examine and determine the validity of the charge; or, indeed, that Congress, constitutionally, may do so. It is quite true that, in cases under the Railway Labor Act, the Court speaks of the "right" of an employee to choose his representative as a right created by Congress and, therefore, as a right which Congress having given, Congress may take away; and it may be that the same answer is appli- [fol. 26] cable here, but I prefer that it should be declared by the Supreme Court rather than by this court. For I had always thought that the right of a man to labor and to enjoy the fruits of his labor was an inherent right—a natural prerogative,—which did not arise out of the concession of any State. I had considered it the foundation of all rights where liberty is recognized, and as a species

[1] Witness, for instance, *Brotherhood of Clerks*, etc. v. *United Employees*, 320 U. S. 715 (137 F. (2d) 817), where the effect of the rule was to force 45 negro station porters, against their protest, to accept representation by a white man's union from which they were excluded.

of property which no law can restrict, save in those socialistic states where individual rights and liberties are unknown. If all of this be true, as I had thought was universally recognized, then—representation—the right to combine one's faculties with those of others and to profit by the combination—is just as incontestable and imprescriptible.

I am, therefore, unwilling to agree that this "right" and its concomitants are subject to the power of Congress or courts to grant or withhold. I think the District Court was correct in asserting jurisdiction.

[fol. 27] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

JUDGMENT—Filed July 24, 1944

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to said District Court with directions to dismiss the complaint.

Per Mr. Justice Edgerton.

Dated July 24, 1944.

Dissenting opinion by Mr. Chief Justice Groner.

[fol. 28] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

DESIGNATION OF RECORD—Filed Sept. 16, 1944

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Appendix to appellant's brief. (Appendix to Petition for Allowance of Special Appeal—pages 16 to 32, inclusive.)
2. Order allowing special appeal.
3. Minute entry of argument.
4. Opinions.
5. Judgment.
6. This designation.
7. Clerk's certificate.

(Signed) George E. Flood, 805 Arctic Building, Seattle, Washington; (Signed) Joseph A. Padway; (Signed) James A. Glenn, 736 Bowen Building, Washington, D. C., Counsel for Appellees.

Acknowledgment of Service

The undersigned hereby acknowledge service of a copy of the foregoing Designation of Record upon appellants this 13th day of September, 1944.

Charles F. McErlean, Counsel for Appellants.

[fol. 29] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 30] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 4, 1944.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 613

INLAND EMPIRE DISTRICT COUNCIL, LUMBER AND SAWMILL WORKERS UNION, LEWISTON, IDAHO; LOCAL 2679, LUMBER AND SAWMILL WORKERS UNION, BOVILL, IDAHO; LOCAL 2664, LUMBER AND SAWMILL WORKERS UNION, CLEARWATER, IDAHO; LOCAL 2766, LUMBER AND SAWMILL WORKERS UNION, POTLATCH, IDAHO; LOCAL 2684, LUMBER AND SAWMILL WORKERS UNION, LEWISTON, IDAHO; LOCAL 2923, LUMBER AND SAWMILL WORKERS UNION, COEUR D'ALENE, IDAHO; AND HARRY HAINES, POTLATCH, IDAHO, INDIVIDUALLY AND AS PRESIDENT OF INLAND EMPIRE DISTRICT COUNCIL, PETITIONERS,

vs.

HARRY A. MILLIS, INDIVIDUALLY AND AS CHAIRMAN AND MEMBER OF THE NATIONAL LABOR RELATIONS BOARD, GERALD D. REILLY, INDIVIDUALLY AND AS MEMBER OF THE NATIONAL LABOR RELATIONS BOARD, AND JOHN M. HOUSTON, INDIVIDUALLY AND AS MEMBER OF THE NATIONAL LABOR RELATIONS BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF

GEORGE E. FLOOD,
Seattle, Washington,
JOSEPH A. PADWAY,
JAMES A. GLENN,
Washington 5, D. C.,
Counsel for Petitioners.

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Table of Cases Cited.

STATUTES AND AUTHORITIES CITED.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No.

INLAND EMPIRE DISTRICT COUNCIL, LUMBER AND SAWMILL WORKERS UNION, LEWISTON, IDAHO; LOCAL 2679, LUMBER AND SAWMILL WORKERS UNION, BOVILL, IDAHO; LOCAL 2664, LUMBER AND SAWMILL WORKERS UNION, CLEARWATER, IDAHO; LOCAL 2766, LUMBER AND SAWMILL WORKERS UNION, POTLATCH, IDAHO; LOCAL 2684, LUMBER AND SAWMILL WORKERS UNION, LEWISTON, IDAHO; LOCAL 2923, LUMBER AND SAWMILL WORKERS UNION, COEUR D'ALENE, IDAHO; AND HARRY HAINES, POTLATCH, IDAHO, INDIVIDUALLY AND AS PRESIDENT OF INLAND EMPIRE DISTRICT COUNCIL, PETITIONERS,

vs.

HARRY A. MILLIS, INDIVIDUALLY AND AS CHAIRMAN AND MEMBER OF THE NATIONAL LABOR RELATIONS BOARD, GERALD D. REILLY, INDIVIDUALLY AND AS MEMBER OF THE NATIONAL LABOR RELATIONS BOARD, AND JOHN M. HOUSTON, INDIVIDUALLY AND AS MEMBER OF THE NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI

To the Honorable The Justices of The Supreme Court of the United States:

The above named petitioners respectfully petition for a writ of certiorari to review a decision of the United States Court of Appeals for the District of Columbia, rendered on

July 24, 1944 (R. 31). Said judgment reversed an order of the United States District Court for the District of Columbia overruling a motion to dismiss petitioners' complaint (R. 17) and dimissed petitioners' cause of action. The case came before the Court of Appeals by virtue of an order of that court allowing a special appeal (R. 25) pursuant to Title 17, Section 17-101 of the District of Columbia Code.

Opinions Below

The District Court for the District of Columbia, Honorable Alan Goldsborough, Judge, entertained the complaint of the petitioners seeking by virtue of the absence of a fair hearing prior to the conduct of an election, to set aside an order of certification issued by the National Labor Relations Board and overruled the respondents' motion to dismiss. The District Court's opinion was rendered April 4, 1944. The unreported opinion is found in R. 16.

Following the rendition of the District Court's order the Board applied for and was granted an order allowing a special appeal to the Court of Appeals, District of Columbia (Rule 11, Federal Court Rules, Court of Appeals, District of Columbia). After considering briefs and hearing argument, the Court of Appeals, District of Columbia, in a divided opinion, Justices Edgerton and Miller for the majority, Chief Justice Groner dissenting, reversed the court below and directed dismissal of the petitioners' complaint in equity. The opinion of the Court of Appeals (majority and dissenting opinions) appear R. 27 and 28.

Jurisdiction

The judgment of the Court of Appeals of the District of Columbia was entered July 24, 1944 (R. 31). Petitioners grounded their action below upon the original jurisdiction conferred upon Federal courts of controversies arising

under the Constitution and laws of the United States (28 U. S. C. A. 41) (1)) over all "suits and proceedings arising under any law regulating commerce" (Judicial Code, 24 (8); 28 U. S. C. A. Sec. 41 (8)), and upon the jurisdiction with which courts of the United States are endowed under the terms of the Constitution itself, Article III, Sec. 2.

The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code as amended; Supreme Court Rule 38, par. 5 (b) and 5 (c).

Statutes

The statutes invoked are the National Labor Relations Act, 29 U. S. C. A. 151, *et seq.*, especially 29 U. S. C. A., Sec. 159 (c). Pertinent sections are set out in Appendix A, together with applicable rules of the National Labor Relations Board governing its construction and application which, under recognized cannons of construction, become incorporated as governing provisions of the law unless wholly inconsistent with statutory language.

Statement of Facts and Matters Involved in This Petition

This is a suit for equitable relief (mandatory injunction) from acts and orders of the National Labor Relations Board alleged to be in plain contravention of the Act of Congress creating the Board and charting its authority. The complaint is on behalf of five local unions, and Inland Empire District Council, an organization of numerous such local unions, all affiliated with the United Brotherhood of Carpenters and Joiners of America and the American Federation of Labor, and Harry Haines, individually and as president of said District Council. The membership of the five local unions involved are employees of Potlatch Forests Inc., a corporation engaged in the lumber and sawmill industry in the State of Idaho. Three of these local unions

represent employees in the company's sawmills located at Lewiston, Coeur d'Alene and Potlatch, Idaho. The other two embrace employees in logging operations at Bovill and Headquarters, Idaho. These five labor unions had for years represented the employees of the company in these five operations.

The petitioners in their cause of action complain that the Board conducted a representation proceeding upon the petition of the Congress of Industrial Organizations (hereafter referred to as the CIO), ordered and held an election, and certified the CIO as the collective bargaining representative, without according to these petitioners a hearing upon due notice, all of which is alleged to be in violation of the specific mandate of Congress in the National Labor Relations Act (29 U. S. C. A. Sec. 159 (c)), and in violation of the due process clause of the Constitution of the United States (Amendment V). (Par. 19, 20 and 26 of the Complaint, R. 5, 6 and 10).

Coupled with the cause of action for equitable relief is one for declaratory judgment declaring the proceedings of the Board in the absence of a hearing vouchsafed by statute and guaranteed by the Constitution *ultra vires* and void, and decreeing the Board's certification of the CIO based thereon invalid. Declaratory Judgments Act, 28 U. S. C. A., Sec. 400, Appendix B.

The complaint (R. 1) alleges that, in March 1943, three locals of the CIO filed with the Board petitions requesting certification as bargaining representative of the employees in three of the five operations of the company, contending that the employees of each of the three operations constituted separate and distinct appropriate bargaining units. A hearing on those three petitions was held by the Board at Lewiston, Idaho, May 14, 1943. The Board thereafter found the units sought in the petitions of the CIO inappropriate for the purpose of collective bargaining and

dismissed the petitions.[1] Upon the dismissal thereof that particular proceeding was terminated.

Accepting such decision as final the CIO thereupon filed a new petition, seeking certification in a single unit alleged to include certain employees in all five of the company's operations, and a month later followed this with a motion requesting that the cases theretofore dismissed be reopened and that their petition be treated as an amendment to the original petitions, and that an order be entered peremptorily by the Board directing the holding of an election without affording a hearing on the new petition (R. 4).

Thereupon the Board granted the motion of the CIO, over the objection of these petitioning AFL unions, and issued an order directing the holding of an election in a single unit composed of certain employees in all five plants of the company (including the two plants located at Potlatch and Couer d'Alene, which were not included in the units sought by the CIO in its original petitions), all without affording a hearing or notice of hearing on the new issues involved.[2] The new issues included whether a question concerning representation had arisen since the dismissal of the former petitions, whether it should be resolved by an election, whether a determination was barred by a valid subsisting contract or for other reasons, and particularly the extent of the appropriate unit and the question of which classifications of employees should be permitted to vote in the election.[3] The last question was particularly important because some classes of employees were employed only at the Potlatch and Coeur d'Alene plants which were not involved in the first petitions. Other

[1] In the matter of Potlatch Forests, Inc., and I. W. A.-C. I. O., 51 N. L. R. B. 288.

[2] In the Matter of Potlatch Forests, Inc. and I. W. A.-C. I. O., 52 N. L. R. B. 1377.

[3] See Complaint, R. 7 and 8.

new and incidental questions included the date and places for the election, the payroll date to be used in determining eligibility to vote (which is particularly important where, as here, a large turnover is involved), whether a large number of employees absent in military service possessing employment status and seniority rights should be permitted to vote, and the form of the ballot. All these matters must be determined at or after a hearing but no hearing was allowed on this petition. The record made of the hearing of the former petitions involving different issues was necessarily wholly inadequate for the purpose, but nevertheless the Board arbitrarily determined the new issues without hearing or notice of hearing on the new petition.

The Board, without a hearing, determined which classifications of employees should be excluded from the election, as well as the other issues involved, with the result that the CIO secured a majority. Such majority, however, was less than 50% of the employees eligible to vote under the Board's order.

After the election and as a result of the continued protest of these petitioning AFL unions that a hearing and due process had been denied, the Board, on motion to reconsider and vacate its Decision and Direction of Election, granted a hearing but refused to vacate its Decision and Direction of Election. However, the hearing held after the election was manifestly insufficient especially since the extent of the unit and the employees eligible to vote must be determined before the election. Based upon the result of this election, the Board issued its order certifying the CIO as collective bargaining representative.[4]

The complaint by appropriate allegations alleges this conduct and procedure to be arbitrary and capricious, specifically contrary to Sec. 9 (c) of the National Labor

[4] Potlatch Forests, Inc. 55 N. L. R. B. No. 44.

Relations Act, Sec. 3 of the Rules and Regulations of the Board, and violative of Amendment V of the Constitution. It spells out a clear trespass by the Board on the constitutional concept of due process, by pleading that no notice of the new issues was served on the parties concerned. No hearing on the issues was tendered to the parties affected, nor was a hearing on the issues so framed ever held.

Following the certification of the CIO as collective bargaining representative, petitioners filed their complaint in the District Court. The Board moved to dismiss which motion was overruled. The Board then appealed by special appeal to the Court of Appeals for the District of Columbia, which reversed the lower court and ordered a dismissal of the complaint. Your petitioners now seek a review and reversal of that judgment by this Honorable Court.

Questions Presented

1. May the petitioners invoke the protection of the courts of the United States in order to review a proceeding of the NLRB, judicial or quasi judicial in nature, for the purpose of insuring those requisites of a fair hearing and of due process enjoined upon the Board by the statute creating it and by the Constitution alike, where the cause of action sets forth an infringement of the statutory mandate of a fair hearing and a violation of the constitutional requirement of due process? Despite the constitutional provision that all questions arising under that instrument are committed to the judiciary, are petitioners and all other litigants concluded by administrative recitals professing compliance with due process?

2. Is the rule of the *Switchmen's* and cognate cases[5]

[5] *Switchmen's Union of N. A.* v. *N. M. B.* 320 U. S. 297;
General Committee of Adjustment v. *M. K.* 320 U. S. 323;
General Committee of Adjustment v. *S. P.* 320 U. S. 338;
General Grievance Com. v. *Gen'l. Com. of Ad.*

granting to administrative agencies, such as the Railway Mediation Board under the Railway Labor Act, a high degree of administrative finality intended to extend to the NLRB and other like agencies a complete autonomy and finality in matters reaching into the realm of constitutional law to such an extent and degree that administrative findings as to fair hearing and due process (though conclusively contradicted by their own record) are exclusive of the right of review traditionally exercised by courts of the United States?

Reasons for Granting the Writ

1. *Decision Contra Historic Line of Decisions of this Court.*

The decision of the Court of Appeals for the District of Columbia by a divided court is in conflict with the whole current of decisions of this Honorable Court upon the subject of constitutional law and due process. The majority of the court below conceived this court's decision in the *Switchmen's* and related cases as compelling courts of the United States to decline jurisdiction and to do so in every instance and situation, even those extending into the field of constitutional law. The Court of Appeals, it is respectfully submitted, arrived at its result by erroneously construing and applying the cases grouped under the heading of "Switchmen's cases", *supra.* The scope of those decisions neither embraces nor contemplates a case such as that with which we are here concerned. Our case presents a controversy which has to do with invasion by an administrative agency of the right of fair hearing—a right afforded specifically by the statute (29 USCA 159 (c)) and guaranteed as well by the constitutional requirement of due process. Those decisions left unimpaired the traditional right of every citizen to require that administrative procedure conform to due process and that inquiry

and examination with respect to the adequacy thereof is always within the special province of the judiciary in conformity with the requirements of the Constitution of the United States.

2. Decision Below Contrary to Guaranty of Federal Constitution, Denies Judicial Review of Constitutional Questions and Reposes Finality in Such Questions in Administrative Agency.

The decision of the Court of Appeals of the District of Columbia denies these AFL petitioners the protection of the courts of the United States in a case where the inalienable right to a fair hearing and constitutional due process is infringed by procedure before an administrative agency. This question, never heretofore passed upon by this Honorable Court, is of great and paramount interest.

3. The Question Presented is One of Great General Importance which Has Not Been, but should Be, Settled by This Court.

The question of jurisdiction of the District Court here presented has been foreshadowed in the decision of this Court in the case of the *American Federation of Labor* versus *National Labor Relations Board,* 308 US 401. In that decision this Court stated in reference to this question that:

> "It can be appropriately answered only upon a showing in such a suit that unlawful action of the Board has inflicted an injury on the petitioners for which the law, apart from the review provisions of the Wagner Act, affords a remedy. This question can be properly and adequately considered only when it is brought to us for review upon a suitable record."

In the present case Chief Justice Groner, dissenting, referred to the absence of a decision of this question by

this Court and expressed the preference that the law should be declared by the Supreme Court (R. 30).

Numerous District courts have taken jurisdiction of similar actions involving representation proceedings of the Board and confusion will be allayed by a decision of this question by this Court.

American Federation of Labor, et al v. *Madden et al* (U. S. D. C., D. C., 1940), 33 Fed. Supp. 943;

International Brotherhood of Electrical Workers, et al v. *N. L. R. B.* (D. C., Michigan, 1940), 41 Fed. Supp. 57;

Klein v. *Herrick* (D. C., S. D., N. Y., 1941), 41 Fed. Supp. 417;

Inland Empire District Council, Lumber and Sawmill Workers Union, et al v. *Thomas P. Graham, Jr., et al* (U. S. D. C., W. D., Wash., 1943), 53rd Fed. Supp. 369 (opinion by Judge Black in case brought prior to Labor Board election involving some facts present here.) Action dismissed as premature.

4. Decision Below Permits Administrative Agency to Enlarge its own Jurisdiction Contrary to Limitation Imposed by Congress.

The decision of the Court of Appeals precluding any judicial review whatsoever and leaving the matter of appropriate hearing entirely to the pleasure of the Board left that agency free to withhold, impair or emasculate the statutory grant of an appropriate hearing, and thus by implication to enlarge its authority beyond that vested in it by Congress, in effect to modify, withdraw, amend or repeal the Act of Congress. Courts of the United States will not stand by idle or helpless and permit an agency created by Congress under the doctrine of judicial immunity to defy a congressional demand.

5. Decision Below Misconceives Scope and Purport of Decision in Switchmen's and Similar Cases and, Taking it from its Context, Transposes it to Apply to Constitutional Questions of Due Process not Involved Therein.

The Court of Appeals of the District of Columbia has, it is submitted, taken the *Switchmen's* and cognate cases, which involve purely the Railway Mediation Board and the Railway Labor Act, out of their context. The facts out of which those cases evolve limit their application to the recognition of administrative finality so long as the agency in question proceeds within the authority committed to it by Congress.

That principle appropriate under the facts of those cases cannot be superimposed, however, and made to control a case such as ours which pleads a positive failure and refusal on the part of the Board to comply with the command of Congress that it grant a hearing as a condition to the validity of its action and to conduct by the Board resulting therefrom, which amounts to a denial of due process under the Fifth Amendment to the Constitution. Congress may lodge finality in a bureau where it proceeds in accordance with law, but it may not do so where the agency defies the law and violates the Constitution.

In thus transposing the rule of the *Switchmen's* cases from the circumstances there present to cover those involving violation of due process as in the instant case, the Court of Appeals, it is submitted, adopted a highly erroneous view.

Prayer

WHEREFORE, petitioners pray for a writ of certiorari to issue from this Honorable Court reviewing the judgment of the United States Court of Appeals for the Dis-

trict of Columbia entered in this cause July 24, 1944, to the end that the judgment of that court be reversed by this Honorable Court and that your petitioners have such other and further relief in the premises as to this Honorable Court may seem lawful and just.

By GEORGE E. FLOOD,
Seattle, Washington,
JOSEPH A. PADWAY,
JAMES A. GLENN,
Washington 5, D. C.,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No.

INLAND EMPIRE DISTRICT COUNCIL, LUMBER AND SAWMILL WORKERS UNION, LEWISTON, IDAHO; LOCAL 2679, LUMBER AND SAWMILL WORKERS UNION, BOVILL, IDAHO; LOCAL 2664, LUMBER AND SAWMILL WORKERS UNION, CLEARWATER, IDAHO; LOCAL 2766, LUMBER AND SAWMILL WORKERS UNION, POTLATCH, IDAHO; LOCAL 2684, LUMBER AND SAWMILL WORKERS UNION, LEWISTON, IDAHO; LOCAL 2923, LUMBER AND SAWMILL WORKERS UNION, COEUR D'ALENE, IDAHO; AND HARRY HAINES, POTLATCH, IDAHO, INDIVIDUALLY AND AS PRESIDENT OF INLAND EMPIRE DISTRICT COUNCIL, PETITIONERS,

vs.

HARRY A. MILLIS, INDIVIDUALLY AND AS CHAIRMAN, AND MEMBER OF THE NATIONAL LABOR RELATIONS BOARD, GERALD D. REILLY, INDIVIDUALLY AND AS MEMBER OF THE NATIONAL LABOR RELATIONS BOARD, AND JOHN M. HOUSTON, INDIVIDUALLY AND AS MEMBER OF THE NATIONAL LABOR RELATIONS BOARD.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Opinion of the Court

The opinion of the United States Court of Appeals, decided July 24, 1944, is printed in the record herein at R. 27, dissenting opinion at R. 28.

Jurisdiction

A statement of the jurisdiction of this Court is set forth in the foregoing petition for writ of certiorari.

Statement of the Case

The foregoing petition for writ of certiorari contains a concise statement of the case and, in the interest of brevity, will not be repeated here.

Specification of Errors

1. The Court of Appeals for the District of Columbia, in its opinion by a divided court, erred in holding that the District Court has no jurisdiction of the present suit.

2. The Court of Appeals for the District of Columbia erred in reversing the ruling of the District Court and in ordering a dismissal of the complaint herein.

ARGUMENT

I.

The Absence of Specific Provision for Review in the National Labor Relations Act Does Not Preclude Resort to Traditional Remedies for Relief in Equity

This Court held in the case of *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, that the review provisions of the National Labor Relations Act did not encompass a case such as here presented. With respect to a case involving only a proceeding for certification of collective bargaining representatives and certification thereof, Congress was silent in so far as review was concerned. Congress did provide for a judicial review of representation proceedings by petition to the Circuit Court of Appeals of the United States when an unfair labor

practice order of the Board is based upon such certification proceeding, and the record of the investigation shall be included in the entire record in such cases (Sections 9(d), 10(e) and 10(f), National Labor Relations Act). This Court, however, rendered clear in that decision that the absence of specific statutory provision for review does not necessarily preclude the applicability of traditional remedies for relief in equity, and the existence of such a remedy was adverted to by the Court of Appeals for the District of Columbia in that case. *American Federation of Labor* v. *National Labor Relations Board,* 103 Fed. (2) 933. This Court reserved decision thereon for some proper occasion, such as is presented by the record in this case, and indicated that a certification is a final order.

If the District Court does not have jurisdiction of the cause of action set forth in the complaint herein, then your petitioners are denied all right of appeal, and appeal is likewise denied in all representation cases in which the employer recognizes the validity of the certification of the Board or in which the Board fails or refuses for any reason to prosecute the employer for unfair labor practices in refusing to bargain with the certified representative. The Board has full discretion to refuse to prosecute such a case. *Progressive Mine Workers* v. *National Labor Relations Board* (C. A., D. C. 1940) 3 Labor Cases 60, 393; *Amalgamated Utility Workers* v. *Consolidated Edison Co.,* 60 S. Ct. 561, 2 Labor Cases 29. Thus, if the present review is denied, appeal in any representation case must depend upon whether or not the Board issued a complaint and prosecutes to conclusion the employer for refusal to bargain. To impute such an intent to Congress would be manifestly unwarranted.

The provision of the Act (Section 10(a)) relied upon by the court in *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41, (a complaint case), giving exclusive jurisdiction

to the Board, by its terms applies only to complaint cases in prosecutions for unfair labor practices before the Board. Hence, there is no statute or decision of this Court precluding a right to review in the present case, and such a denial cannot be inferred in view of the traditional remedies afforded by constitutional and statutory provision.

The remedy where due process is involved is committed to the judiciary.

> "The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States and treaties made, etc., * * *" (Constitution, Article III, Section 2.)

To the extent to which the Constitution in such respects may not have been deemed executory, Congress implemented the provisions thereof by passage of the Judiciary Act, an enactment of the Judicial Code endowing the courts of the United States with the power to hear and determine all suits and controversies arising under the Constitution.

> "The District Court shall have original jurisdiction as follows: (1) of all suits of a civil nature at common law or in equity * * * where the matter in controversy (a) arises under the Constitution or laws of the United States." (Judicial Code, Sec. 24, 28 U. S. C. A., Sec. 41(1).)

Again:

> "of all suits and proceedings arising under any law regulating commerce." (28 U. S. C. A. 4(8).)

Conceding that Congress provided no judicial remedy within the Act for redress of a failure to grant a hearing conformable to the concept of due process, certainly it cannot be said that Congress thereby intended to withdraw judicial remedy. The power to do so is beyond the com-

petence of Congress. The power to extend judicial protection stems directly from the Constitution itself. Congress may either expressly or *sub silentio* withdraw judicial review of an infinite variety of administrative procedures under this or any other act. It cannot, however, withdraw the power of the judiciary to enforce the constitutional sanction of a fair hearing or due process and this obviously for the reason that it is not competent thus to repeal or to rescind substantive provisions of the Constitution. In brief, the rule of the *Switchmen's* case and cognate cases may be taken to apply to procedural processes where the Board acts administratively in its legislative function, but can have no application wherever the Board is charged with infringing or encroaching upon basic constitutional rights. Such a construction would render the Act unconstitutional, and it is familiar law that the courts will impute no such intent to Congress. Hence, this Court will, we feel justified in submitting, indulge no intention on the part of Congress to withdraw judicial protection for the enforcement of a fair hearing and of due process, no matter how much such an intent may have been implied where purely administrative and legislative procedures, such as those comprehended under the Railway Mediation Act and the *Switchmen's* cases, are concerned. We are confident that this Court will not read into the Act that which is not there, namely, the intendment to suppress the constitutional guarantee of judicial protection of due process. It would be intolerable to give high judicial sanction to a premise that Congress may freely withdraw resort to judicial review of a question which involves the essential requisites of due process or other constitutional guaranty.

For all purposes in this case, we may freely concede under principles elucidated in the *Switchmen's* and cognate

cases hereinafter discussed that judicial review by Congress was totally withdrawn by the Railway Labor Act and analogous legislation as to all procedures purely legislative or administrative, particularly so where the agency involved proceeded within the scope of the authority committed to it by Congress. In such circumstances, Congress may properly evince an intent to invest exclusive procedural power over the subject matter in the agency in question and courts will properly respect such intent.

But this leaves unaffected and undisposed of the vital question not involved and presented in the *Switchmen's* and related cases, that is, the question whether Congress intended to suppress a judicial remedy and judicial relief for the protection of the constitutional grant of due process and of a fair hearing, and the further question with respect to whether or not Congress is competent to suppress such judicial remedy. The Court of Appeals, in the opinion of Justices Edgerton and Miller, felt compelled to disallow resort to judicial protection under the construction which it placed upon the *Switchmen's* and related cases. The majority, in fact, conceived or at least expressed no distinction whatsoever between the power of Congress to suppress the remedy of judicial review of administrative acts and decisions within the *scope of authority committed to the administrative agency by Congress* and the power or want of power in Congress to suppress the remedy of judicial review *in matters relating solely to the constitutional right to a fair hearing and to due process.* This distinction, unappreciated by the majority, was clearly seized by Chief Justice Groner in his dissenting opinion when he expressed emphatic objection to the proposition implicit in the majority's opinion that federal courts, which derive jurisdiction from the Constitution itself, could ever be divested of the power to review and pass upon con-

stitutional questions, such as the adequacy of a fair hearing or of due process. The Chief Justice expressed the conviction that the question constituted a matter highly worthy of the attention of the Supreme Court of the United States. We therefore respectfully submit that it is vitally appropriate at this particular juncture in the evolution of administrative law for the Supreme Court to consider and pass upon this question.

Let us enumerate and in one or two instances briefly comment upon historic cases of this Court which preserve to the United States courts the province of confining administrative bodies within the statutory limit of their jurisdiction and authority:

Crowell v. *Benson*, 1932, 285 U. S. 22;
State Commission v. *Safety Gas Co.*, 290 U. S. 561;
Ohio Valley Water Co. v. *Ben Avon*, 253 U. S. 287;
Shields v. *Utah-Idaho Central R. R.*, 305 U. S. 177;
United States v. *Idaho*, 298 U. S. 105.

The case last cited involved an interesting question. A condition precedent to the exercise of jurisdiction by the Interstate Commerce Commission was whether the trackage in question came within or without an exception relating to a spur. Despite the I. C. C.'s holding to the contrary, an independent suit in equity before the District Court, wherein it was found to be included within the spur exception, was affirmed. We in our case likewise seek to determine whether the condition of a fair hearing commanded by Congress was or was not complied with. The case likewise placed a very definite emphasis on the principle that fair hearing, including notice and opportunity to meet issues, constituted the essential substance of due process.

United States v. *Abilene*, 265 U. S. 274:

> "Adversary proceedings are of a judicial nature and are governed by constitutional requirements of procedural due process. * * *"

Morgan v. *United States*, 298 U. S. 468 (1936) and 304 U. S. 1 (1938);
Ohio Bell Telephone v. *P. U. C.*, 301 U. S. 292;
St. Joseph's Stockyards v. *United States*, 298 U. S. 38.

There again, this Court announced the rule that courts of the United States may engage in an independent inquiry as to whether rights are confiscatory and violative of due process. United States courts are not bound by findings with respect thereto of an administrative body. Likewise, note its holding that a prerequisite to a administrative finality of findings and procedure is compliance with due process and a fair hearing:

> "When the legislature appoints an agent to act within the sphere of legislative authority, it may endow the agent to make findings of fact which are conclusive; provided the requirements of due process * * * are met. * * * Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation." (*St. Joseph's Stockyards* v. *United States*, 298 U. S. 38.)

In the case of *Utah Fuel* v. *National Bit. Coal Com.*, 306 U. S. 56, this Court held with the District Court below that an independent suit in equity for relief would lie in the courts of the United States, although it affirmed the finding of the District Court that the Commission's procedure was entirely pursuant to its statutory authority, and therefore dismissed the complaint, not because it did not state grounds for relief, but upon its merits. Warrant

for our action is clearly to be found in the language of the Court in that case:

> "Considering the circumstances here alleged, the great and obvious damage which might be suffered, the importance of the right asserted and the lack of any other remedy, we think complainants could properly ask relief in equity (p. 60)."

Kwok Jan Fat v. *White*, 253 U. S. 454. This case is representative of a long series of cases holding that alien Chinese are entitled to the essentials of a fair hearing even in such a summary matter as a deportation case.

C. M. & St. P. Ry v. *Minnesota*, 134 U. S. 418, illustrating the principle that, where an agency's findings are non-reviewable by statute, the duty is all the more incumbent upon the courts to insure compliance with notice, hearing and due process. Cf. also an opinion by the late Justice Holmes in *Miller* v. *Horton*, 152 Mass. 540, 26 N. E. 100. Likewise, *Kuntz* v. *Sumption* (Ind.), 19 N. E. 474, at 477. Also cases discussed by the late Justice Brandeis requiring notice and hearing in *I. C. C.* cases in the decision of this Court in *Chicago Junction* cases, 264 U. S. 258, at 263-264; *Columbia Broadcasting Co.* v. *United States*, 316 U. S. 407.

II

The Decision Below Misconceives the Scope and Purport of Decision in Switchmen's and Similar Cases and, Taking it from its Context, Transposes it to Apply to Constitutional Questions of Due Process Not Involved Therein.

The *Switchmen's* case arising under the state of facts involved therein, as we have heretofore touched upon, is no barrier to the exercise of equitable jurisdiction by the courts of the United States under the circumstances presented here. A vital factor absent in the *Switchmen's* case, re-

lated and subsequent similar cases—is present here. The factor thereby presented lends to our case the highest significance: We are here dealing with no mere question of legal error inhering in the discharge of a legislative or administrative function. We are confronted with a judicial question involving administrative encroachment and infringement upon the constitutional privilege of due process and of fair hearing.

The question for this Court's determination then is whether the majority below was correct in its assumption that the *Switchmen's* and kindred cases were intended by this Court to constitute the Alpha and Omega of all law upon the subject of administrative agencies, such as the Railway Mediation Board and the N. L. R. B. If so, was the majority below justified in assuming that this Court in that decision intended to lay down the broad and universal proposition that the courts of the United States are powerless to intervene in equity to protect the enforcement of constitutional rights. Is it necessary for the courts of the United States to conclude that that case was intended to announce a principle that action and decisions of administrative agencies, even on constitutional questions, so far supersedes the traditional remedies in equity provided by the judiciary act as to leave such constitutional rights wholly to the mercy of administrative bodies?

It will be perceived that this presents another and a different question than that at issue or that decided in the *Switchmen's* and similar cases. That case did not require that its rule, however, appropriate there, should be extended to cover all administrative decisions so as to render them forever final, irrevocable and non-reviewable even though they deal with constitutional questions. To enthrone administrative bodies with such a degree of administrative finality in judicial and administrative questions would be to confer upon it a revolutionary autonomy wholly out of

place in our system of jurisprudence. It would be a step not in the slightest extent foreshadowed or suggested in the *Switchmen's* case. The distinction between the integrity of the judicial function so far as necessary to preserve and integrate constitutional privileges, rights and sanctions on the one hand, and administrative function on the other, constitutes a sharp line of demarcation between the American democratic process and the continental system of executive absolutism.

We advocate nothing herein which would for a moment arrest or restrain the development of governmental efficiency resulting from resort to or employment of the administrative process and administrative law. Congress has frequently entrusted and may well continue to entrust the complex problems of government today, involving as they do technical, scientific, factual and accounting problems, to administrative specialists, and courts very properly do and should continue to encourage the development of the administrative function. Courts do not substitute their judgment, and we are not here asking the courts of the United States to do so, upon administrative matters for that of the administrative agency specially set up for that purpose. We merely urge—and that and nothing more is involved herein—that administrative bodies be limited to the extent only that they may be restrained from substituting their summary informal and executive judgment upon judicial, and particularly constitutional questions, for that of the members of the judiciary specially trained and selected for that particular function to whom the Constitution and Congress have specially committed the task.

We conceive nothing in the rationale of the *Switchmen's* and cognate cases, justifying any other principle than that which we have just defined. Since, however, the Board at all times and the majority of the court below, in its divided opinion, rested their thesis throughout upon what they sup-

posed to be the conclusion of the *Switchmen's* case, compelling the Federal judiciary to stand aside in the face of administrative decisions under any and all circumstances, let us then devote a brief examination to that case. Its factual content related, as did its companion cases, to jurisdictional disputes over claimed rights to represent employees of a railway. The undisputed province of the Board was that of designating the bargaining agency. So long as the Board discharges its statutory duty, employees were bound by its findings as to which organization represented a majority. The Board's acts *intra auctoritate* were final. In that case due process was admittedly afforded and the question present in ours was absent there. This Court held under such circumstances that the Board's discharge of its administrative function was non-reviewable, that it was intended to be so by Congress, and that the courts could not substitute their judgment for that of the Board. Similarly, we too may concede that had we received that notice and that hearing commanded by Congress, we likewise would be bound by the procedure of the Board and would have no complaint cognizable in the courts of the United States.

We, however, have a concrete, specific right to a hearing which was infringed and denied. The *Switchmen's* case did not purport to close the door to such circumstances. Justice Douglas, speaking for the court, recognized the power of the judiciary to vindicate rights of a fundamental character which otherwise would be obliterated.

Note the careful blueprint which he laid down in order to insure that no vital constitutional right should ever be sacrificed to a summary administrative process:

> "If the absence of jurisdiction of federal courts meant a sacrifice or obliteration of a right which Congress has created, the inference would be strong that Congress intended the statutory provisions governing

> the general jurisdiction of those courts to control (cases) * * *. In those cases it was apparent that but for the general jurisdiction of federal courts, there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act."

In a later case from this Court, that of *Stark* v. *Wickard*, 321 U. S. 288, a great deal of light was cast upon the operative scope of the *Switchmen's* decision. From a reading thereof, it is manifest, we submit, that this Court reiterates the propriety of extending judicial protection to all cases where, but for the jurisdiction and the relief available in Federal courts of equity, no means might otherwise be found for the enforcement of valuable granted rights. In that case where there was absent statutory scheme of review, this court none the less had no hesitancy in invoking a general equity power to restrain the Secretary of the Agriculture from making certain deductions extrinsic to statutory authority.

Here too we have a right to notice and hearing founded on an express command of Congress. Note Justice Reed's language in *Stark* v. *Wickard* (page 309, 10):

> "When definite personal rights are granted by federal statute * * * the silence of Congress as to judicial review is, at any rate in the absence of an administrative remedy, not to be construed as a denial of authority to an aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction. When Congress passes an act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers. The

> responsibility of determining the limits of statutory authority in such instances is a judicial function entrusted to the courts by Congress by statutes establishing courts and marking their jurisdiction . . . Under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights, whether by unlawful action of private persons or by the assertion of unauthorized administrative power."

We are mindful of the decisions of the Court of Appeals, cited by the majority below as authority for its refusal to authorize intervention by a court of equity. That they are not applicable here, we think clearly appears from a reference to their facts and holdings.[6]

We may conclude this discussion of the subject, therefore, by a reference to our constitutional and statutory right to notice and a fair hearing. This is a right which may not be trifled with by an administrative body, nor may such body whittle it away to suit its own pleasure or fiat. It is a right possessing a definite connotation of judicial definitions, and the granting thereof is rendered a condition precedent by the command of Congress imposed upon the Board *in limine* before it may proceed with the exercise of its authority. By affording notice and hearing conformable to due process, the Board has undoubted authority to proceed and may invest itself with administrative finality. By failure thus to accord it, it does not bring itself within the principle of judicial immunity. We therefore clearly plead ourselves within every definition admitting judicial protection and relief laid down by this Court.

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[6] *Order of Railway Conductors of America* v. *N. M. B.* 141 Fed. 2d 366; *Union Transport Service Employees of America* v. *N. M. B., C. A.* D. C. 141 Fed. 2d 724; *National Federation of Railway Workers* v. *N. M. B.* C. A. D. C. 141 Fed. 2d 725.

III

Distinguishment of Cases Assumed by Court Below to Support its Construction of Switchmen's Case

A majority of the Court of Appeals in support of its decision, cited a number of cases as presumably authority for its view that the *Switchmen's* case required it to deny judicial intervention in our case, and in order to demonstrate the non-applicability of those cases we shall briefly notice their facts and holdings.

First was the *Order of Conductors of America* v. *National Mediation Board*, C. A. D. C., 141 Fed. 2d 366. The Court of Appeals in that case held the Board immune to judicial review under the rule of the *Switchmen's* case although it criticized the Board for failure to investigate charges of collusion between management and a labor organization prior to an ordered election. The *ratio decidendi* proceeded upon the premise that the procedure of conducting elections was within the exclusive commitment of Congress. Confined to the fact of that case, we have no quarrel with it. There was no question of due process, fair hearing or constitutional law raised, discussed or decided.

Second, is the case of *Union Transport Service Employees of America* v. *National Mediation Board*, C. A. D. C., 141 Fed. 2d 724. The Board there proceeded to do only that which Congress confided exclusively to its processes, namely: to hold an election. The complaint lodged against the Board related purely to the mode of counting ballots. Though the District Court entertained jurisdiction, the Court of Appeals properly dismissed the complaint under the rule of the *Switchmen's* case. There again no constitutional question of fair hearing or due process was present. Hence the decision has no relevancy whatsoever to our inquiry.

Third, *National Federation of Railway Workers* v. *National Mediation Board*, C. A. D. C., 141 Fed. 2d. 725. Again the Board held an election denying voting privileges to a certain group after affording the group a complete hearing. The group thereafter resorted to equity. The District Court dismissed its complaint, the Court of Appeals affirming. No conceivable question of constitutional law was there involved. The matters complained of were manifestly inherent in the investigatory process committed to the Board by Congress and merged in the discharge of its legislative function. The decision can have no bearing on the solution of our problem.

A case much in the mind of the court upon argument and referred to by the majority in its opinion was its own recent War Labor Board Decision: *Employers Group Motor Freight Carriers* v. *W. L. B.*, 143 Fed. 2d 145, Justice Edgerton, writing the opinion for the court. That case arose under the jurisdiction of the War Labor Board and the authority of various executive orders and acts of Congress conditioning its processes and procedure. An agency of that Board following investigation and hearings established certain increased wage rates within the area concerned, which in effect were adopted by the Board. The industry complained of the Board's violation of its legal authority in that it erred in considering certain economic factors upon which it predicated its increases. It asserted that such rates, if paid by industry, would produce industrial "failure and dissolution."

The Court of Appeals expressed the opinion that the Board's acts were non-reviewable in the light of the legislative history disclosing a congressional purpose to remove WLB decisions from the periphery of judicial review. Having in mind the context of the Act and the purpose motivating the creation of the WLB, we entertain no doubt

of the propriety of that decision and particularly is this true when we examine the considerations set forth in the opinion in detail, which establish that no possible question of constitutional law was there involved. The court pointed out that none of the acts authorizing War Labor Board procedure conferred upon that board any enforcement power whatsoever. Its directives were "directory only, not mandatory" and "without legal sanction." Industry, therefore, being under no compulsion to pay increased rates was uninjured, unaggrieved.

Nor is there anything in the textual body of the court's discussion of the formula governing judicial review of administrative action, which conflicts with the principle of review which we here seek. Whether we plead (1) administrative action directly injurious to our legally protected interest, or (2) whether our case falls within the orbit of the second category of administrative action furnishing the basis for future judicial proceedings against the plaintiff, is a question unnecessary here to decide. Both grounds for judicial intervention to review administrative action proceed upon the basic proposition implicit in each that courts of the United States, under the command of the Constitution, do not lose power to enforce constitutional sanctions of due process where invasion of basic personal and property rights by administrative action is put in issue even though the governing statute provides no statutory appellate review.

From what we have said, it is therefore necessary to conclude that we in no wise seek to reopen questions put to rest in the *Switchmen's* case. We do not contend for the right of judicial review of administrative acts performed by the agency in furtherance of its congressional powers. What we do contend, however, is that the Board may not refuse us a hearing commanded by Congress,

and then answer our demand therefor with the defense that it may safely do so and leave us remedyless by virtue of a presumed congressional intent to free the Board from judicial compulsion to obey the law. The Board cannot thus by its own *ipse dixit* place itself above the Congress which creates it. The express grant by Congress of the right to a fair hearing necessarily contradicts the Board's assumption—and the assumption indulged in its favor by the Court of Appeals—that Congress intended to leave the Board unrestrained by any judicial remedy requiring it to comply with law. Implicit in the grant is the correlative thereof of a purpose that the right thus expressly granted be implemented, by adequate legal and judicial sanctions of enforcement.

IV.

The Board Acted in Violation of the Statute Creating it and Charting its Authority and in Contravention of the Constitutional Guarantee of Due Process.

Our complaint charges the Board with having failed to grant us a hearing. Whatever the Board's answer may be to this issue, upon its merits, is at this stage of the proceeding immaterial for the motion to dismiss upon the ground that the complaint fails to state a claim upon which relief could be granted, admits plaintiff's allegations and the question is squarely whether or not the Board is free to defy a Congressional command requiring it to grant a hearing upon notice to the parties involved. The statute provides (Sec. 9 (c) Appendix A) as follows:

> Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In

> *any* such investigation, the Board shall provide for an *appropriate hearing upon due notice*, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives (italics supplied).

Since it is the purpose of a hearing to determine among numerous other things the extent of the appropriate unit and the employees who will be permitted to participate in any election which may be held, it is obvious that the hearing required must precede the election. This view is supported by the history of the legislation. For example, it is stated on page 14 of the Report of the Committee on Education and Labor of the Senate (accompanying Senate Bill No. 1958, 74th Cong., 1st Sess., N. L. R. Act) that:

> Section 9 (b) empowers the National Labor Relations Board to decide whether the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or other unit. Obviously, there can be no choice of representatives and no bargaining unless units for such purposes are first determined. And employees themselves cannot choose these units, because the units must be determined before it can be known what employees are eligible to participate in a choice of any kind.

Moreover, it is crystal clear that the appropriate hearing mandatorily required must be a due process hearing upon due notice affording the parties an opportunity to know the issues and meet opposing claims. That such was the intention of the Congress is clear from the legislative proceedings during the enactment of the law. Almost prophetically, it seems, and out of an abundance of caution, in the final stages of enactment the words "upon due notice" were inserted in Section 9(c) by the Conference Committee; as appears in the Report of Conference

Committee on Senate Bill No. 1958 (74th Cong., 1st Sess., p. 5) which reads:

> House amendment No. 12 inserts the phrase "upon due notice" in section 9(c) providing for hearings by the Board on the issue of collective bargaining representation. The conference agreement accepted this amendment out of abundant caution; though it would perhaps be implied that a requirement of a hearing includes due notice to the parties.

We contend that when the Board resorts to the election process to determine an issue of representation, it must hold a hearing prior to the election, else upon plainest principles of fair play and due process, the result of such election cannot be used as a reliable basis for certification. Not only the Act itself, but the Constitution, requires it. *Federal Administrative Law,* Vom Baur, Vol. I, Sec. 290. Vom Baur says (Vol. I, Sec. 290):

> The right to know and meet opposing claims is a right to have the issues and contentions of opposing parties clearly defined so as to be able to meet them by the introduction of evidence and argument. It must be afforded to every interested party to an adversary proceeding as a requisite of a full hearing. Without the right, the other rights incident to a hearing, such as the right to introduce evidence and present argument, become barren and valueless. Failure to afford the right is more than an irregularity in practice, it is a vital defect. It is not technical, but rests on the plainest principles of justice and fair play. The due process clause guarantees no particular form of procedure to enforce the right, as it is a substantial right which does not depend upon form.

Since by the election the issue is generally decided for all practical purposes, a hearing after an election is insufficient. By the common practice of the Board, a full hear-

ing upon due notice is held before an election with an opportunity for a supplementary hearing after the election at which questions of challenged ballots and violations of the rules of the election relating to campaigning in the vicinity of the polling place and like questions are normally considered. But in this case the Board refused a hearing prior to its Decision and Direction of Election and conducted the election without it.

The Board may not simply push aside interested parties and hold elections indiscriminately with the promise that a hearing will be held after the election to make sure that no interested party is injured. Such a hearing would not be "an appropriate hearing upon due notice" required by the Act. Not only would such a policy create unlimited confusion, but it would unavoidably and unfairly affect the rights of parties by reason of the announcement of election results and the influence thereof in units which might be later found to be inappropriate. It would foster the holding of elections and stir up disputes where no question of representation had been found to exist. It would be the reverse of due process, and would destroy the usefulness of the Board itself by giving it authority to act arbitrarily without an opportunity to exercise discretion based on facts established by evidence.

Likewise the Rules and Regulations of the National Labor Relations Board (Appendix C) having the force and effect of law require the holding of a hearing in every case prior to the election, but the Board violated its own rules. If resort to judicial intervention be withdrawn, the Board in setting up its own procedure is judge not only in administrative and legislative functions which it may discharge, but of constitutional questions involved in its procedure. To that extent it may suppress Congressional requirements and to all prayers for relief it need answer only

with judicial immunity. This Honorable Court does not sanction any principle which will permit any agencies created by Congress to destroy the law provided for their government.

V

The Questions Presented Are of Urgent and Primary Public Importance and in the Interest of Stable and Harmonious Industrial and Labor Relationships Need to Be Answered by This Court

The questions involved here are not mere dry questions of law, nor do they deal solely with disputes between private litigants. They are of far reaching importance in a domain of public administration. The interest of important segments, both of labor and of industry, are involved. The future administration of a great act intended by Congress to be at once the charter of the liberties and obligations of labor and industry alike depends upon the answer. Repercussions of this case may well affect the entire structure of administrative law in its relation to constitutional guaranties.

It is scarcely possible to overstate or overemphasize the tremendous effect which the answer to this question will have upon the every day, practical value which for all time to come may be attached to the inalienable rights and privileges which come to us through that portion of the Constitution associated in the public mind with our bill of rights. Answered, as we trust, by this court it shall be in the tenor of requiring administrative agencies, if they wish to enjoy autonomy within their statutory authority to preserve at all times the substance of due process, then we shall have preserved constitutional concepts of freedom and of government by law rather than by men.

We have no hesitancy in proclaiming in support of this writ and in support of the validity of our cause of action that the courts of the United States under the Constitution and the primary enabling acts of Congress possess a full and plenary power to effectuate constitutional grants of due process. We do so without wishing in the slightest to impinge upon the salutary doctrine of modern times which advocates and urges an extension of governmental efficiency through the medium of administrative specialists. We maintain only that the office and function of administrative bodies must halt wherever it conflicts with the Constitution and its safeguards. Let the judiciary yield ever so little to the administrative and executive power in enforcing the benefit of constitutional protection and it will all too obviously be but the beginning of a gradual process of constitutional surrender. Whenever a conflict between the Constitution and governmental agencies or servants of the government may arise, it is now as always the duty and the privilege of the judiciary to require a halt, in the language of James Otis, "*obsta principiis.*"

Conclusion

It is respectfully submitted that, under the provisions of the Constitution of the United States, and statutes and decisions discussed in the foregoing arguments, petitioners have been denied due process, and the decision of the Court of Appeals for the District of Columbia should be reversed.

Respectfully submitted,

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APPENDIX A

Statutes Involved

The pertinent provisions of the National Labor Relations Act (49 Stat. 449; 29 U. S. C., Sec. 151 et seq.) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer—

* * * * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

Representatives and Elections

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may

investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Prevention of Unfair Labor Practices

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent,

or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit

courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such a person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same

shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States and upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any Circuit Court of Appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

APPENDIX B

The pertinent provisions of the Federal Declaratory Judgments Act (48 Stat. 955, as amended by 49 Stat. 1027; 28 U. S. C., Sec. 400) are as follows:

(1) In cases of actual controversy (except with respect to Federal taxes) the courts of the United States shall

have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

APPENDIX C

The pertinent provisions of Rules and Regulations of the National Labor Relations Board, Article III, Sections 3, 8 and 9 (Eighth Annual Report of the N. L. R. B., pages 223 and 225) are as follows:

SEC. 3. *Same; investigation by Regional Director; definition of parties; notice of hearing; service of notice.*—After a petition has been filed, if it appears to the Regional Director that an investigation should be instituted he shall institute such investigation by issuing a notice of hearing, provided that the Regional Director shall not institute an investigation on a petition filed by an employer unless it appears to the Regional Director that two or more labor organizations have presented to the employer conflicting claims that each represents a majority of the employees in the bargaining unit or units claimed to be appropriate. The Regional Director shall prepare and cause to be served upon the petitioners and upon the employer or employers involved (all of whom are hereinafter referred to as "the parties"), and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a notice of hearing upon the question of representation before a trial examiner at a time and place fixed therein, provided that when the petition is filed by an employer the Regional Director shall serve the notice of hearing on the employer petitioner and on the labor organizations named in the petition (all of whom are hereinafter referred to as "the parties"), and upon any known individuals or labor organizations purporting to act as representatives of any em-

ployees directly affected by such investigation. A copy of the petition shall be served with such notice of hearing.

* * * * * * *

SEC. 8. *Record; what constitutes; transmission to Board.*—Upon the close of the hearing the Regional Director shall forward to the Board in Washington, D. C., the petition, notice of hearing, motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, all of which shall constitute the record in the proceeding.

SEC. 9. *Proceeding before Board; briefs; further hearing; direction of election; certification of representatives.*—The Board shall thereupon proceed, either forthwith upon the record, or after oral argument or the submission of briefs, or after further hearing, as it may determine, to direct a secret ballot of the employees in order to complete the investigation, or to certify to the parties the name or names of the representatives that have been designated or selected, or to make other disposition of the matter. Should any party desire to file a brief with the Board, the original and three copies thereof shall be filed with the Board at Washington, D. C., within seven days after the close of the hearing. Immediately upon such filing, the party filing the same shall serve a copy thereof upon each of the other parties.

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 613

INLAND EMPIRE DISTRICT COUNCIL, LUMBER AND SAWMILL WORKERS UNION, ET AL.,
Petitioners,

vs.

HARRY A. MILLS, INDIVIDUALLY AND AS CHAIRMAN AND MEMBER OF THE NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

In its brief in opposition to the petition for writ of certiorari, pages 9 and 10, the National Labor Relations Board cites a number of cases holding that a hearing need not be held at any particular time in order to fulfill the requirements of due process. The ruling of these cases, however, is not applicable to the circumstances present here.

These cases with which we have no quarrel relate in most instances to tax statutes. They held constitutional statutes which permit an advisory or preliminary investigation of tax or other liability by an agency of the state, provided that before fixed liability be established, process, notice and full hearing of a judicial character be afforded. Each of these cases involves a statutory scheme permitting a judicial review upon notice and full opportunity to all parties to be heard with respect to the action of some administrative subordinate of the state—a review not available here under Section 9 of the National Labor Relations Act.

In the present case we admittedly have no review if the Board complies with the law, affords notice and grants a fair hearing before ordering an election. In such case we can resort to no appellate tribunal. In order therefore for the Board to receive the protection of judicial immunity afforded by the *Switchmen's Case* it must comply with the requirements of the statute and of due process. The Board certainly cannot claim immunity once it over-steps its statutory agency or departs from its authority. The notice and hearing commanded by Congress must be granted as a prerequisite to validity of the Board's actions. *U. S.* v. *McDaniel*, 7 Peters, 1 to 14, 8 L. ed. 587; *Garfield* v. *U. S.*, 211 U. S. 249; *St. Joseph's Stock Yards* v. *U. S.*, 298 U. S. 38; *FCC* v. *Pottsville*, 84 L. ed. 565; Cf. also *Simons* v. *FCC*, CA, DEC, 65 Fed. 2d 381.

A mere reading of the cases cited by the Board serves to establish that nothing therein contained condones or cures failure to grant an antecedent hearing by affording one *ex post facto*.

Gallup v. *Schmidt*, 183 U. S. 300, upheld the validity of a statute of Indiana as against the claim of unconstitutionality because it did not provide for notice and hearing at the

time of its assessment, where, however, the taxpayer received notice, had ample opportunity to participate in a judicial hearing and did actually appear and contest the amount of the assessment before the amount was finally determined and before the tax liability was established. We of course have no statutory right of appeal or judicial review of the Board's action in ordering an election without granting us notice or hearing.

Wilson v. *Standefer*, 184 U. S. 399, upheld the validity of a state statute granting the state the right to forfeit without notice to a delinquent purchaser of state lands, where by law the purchaser had a six months' period within which to come into court upon an ample opportunity to be heard, in order to contest the forfeiture before judgment thereof became final. We have no such statutory right to a hearing before any judicial tribunal.

York v. *Texas*, 137 U. S. 15, sanctions a Texas statute requiring that a challenge to jurisdiction be presented with other defenses and disposed of upon a hearing of the merits, and reviewable upon one appeal, together with a review of all other issues and merits in the case. Again there is no analogy for we are denied any statutory right of review or appeal.

Wells Fargo v. *Nevada*, 248 U. S. 165, is another case upholding a tax statute where assessment was made without notice and hearing, but where process, issues and trial are provided and judgment entered thereon before tax liability is fixed or established. Again we have no statutory right to a judicial hearing to review the Board's action in refusing to afford us notice or grant us a hearing.

U. S. v. *Illinois Central*, 291 U. S. 457, is a similar case upholding the right of the ICC to issue an order fixing rates without a hearing, but providing that the order has

not legal status of enforceability unless or until, upon complaint, a full hearing is held before such rates are put into effect.

Nickey v. *Miss.*, 292 U. S. 393, is again a decision upholding a tax statute rendering a tax assessable without a notice, but providing that tax liability may not be fixed or established until after formal process issues and with a full opportunity for trial and hearing.

Opp v. *Administrator of Hours and Wages*, 312 U. S. 126, much relied upon by the Board throughout these proceedings, is merely an analogous case holding that an industry committee, empowered under the Act to conduct an investigation and make recommendatory reports to the Administrator, does not violate due process where no notice of hearing is afforded by the Committee since the Act provides for a full hearing upon notice to all parties before the Administrator. There the aggrieved party actually appeared and participated at such hearing before the Administrator issued a decision establishing and affecting the rights of the parties. The decision of the Board in our case ordering the conduct of an election, and the actual conducting of an election, was no mere act of an advisory committee. It was an official decision of the Board, which the Board was empowered to make only after service of notice to all affected parties, apprising them of the contents of the petition and the holding of a hearing. Whether an election be held at all or not, or whether it was barred by our contract, who should participate therein and who should be excluded therefrom—these and many others were all issues determinable only after notice or hearing.

It is no answer to say that the Board is free to determine these vital issues without notice or hearing, and then months after grant us a hearing *ex post facto*, after the prejudice occurred and the harm is done. An *ex post facto*

hearing is not judicial. It is not what the statute commands. It is not an "appropriate hearing." It is not due process nor does anything in the *Opp* case intimate so. The Board's position would have a certain degree of persuasiveness entirely lacking here had it in fairness, in accordance with judicial procedure, first vacated its order and decision of election, something which it steadfastly, however, has refused to do. Clinging, therefore, at all times to its decision and order requiring an election, without granting us notice or hearing, it is nothing more than an empty formality of going through idle motions to extend to us an *ex post facto* hearing.

In the *Opp* case, it will be noted that before the Administrator acted he gave full notice and granted a complete and formal hearing. In our case the Board decided first to hold an election without notice or hearing, and then belatedly sought to grant us a *nunc pro tunc* substitute therefor. *But there is no substitute for due process.*

American Surety Co. v. *Baldwin*, 287 U. S. 156, upheld the validity of a statute of Idaho permitting a trial court to enter judgment against the surety company where the merits of any defense which the surety company might have thereto were, according to statute available to the company by procedure within the state courts, but where the company lost its right to pursue such procedure by failing to act within the statutory time. It is enough again to point to the fact that we have no statutory remedy to review the failure of the Board to accord us notice and hearing.

The Moore Ice Cream Co. v. *Ross*, 289 U. S. 373, the facts have no relevancy whatsoever to ours. The case merely held that a tax paid without protest under the law of 1917 could be collected back under the law of 1924 dispensing with protest, where no protest prior thereto had been made.

These cases involve an attack upon the constitutionality of various state statutes. We do not for a moment question the validity of the National Labor Relations Act. We merely attack the Board for refusal to follow the statute. We address ourselves to the single question of whether or not the Board, under an act admittedly valid, has the power to violate that Act, to refuse us notice and hearing commanded by statute and yet to claim the protection of judicial immunity. Again, can the Board offer us a substitute for the notice and hearing commanded by Congress, for the notice and hearing specifically prescribed by its own rules and regulations—and tell us that we must accept that substitute in lieu of the due process vouchsafed us both by Congress and by the Constitution itself? Can it decide first and then tell us that we must be satisfied with an *ex post facto* hearing after it had already acted upon its decision? Is that due process? We think not. Nor does the *Switchmen's* case in any wise deny the Courts, under the constitution, the right to inquire into the adequacy or inadequacy of hearing procedure, to conform to due process. It protects the Board when pursuing its authority, but does not license it to violate the very law under which it operates.

Constitutional law has evolved to a substantial and a very measurable degree since 1884 when this court, through Justice Matthews, in *Hurtado* v. *California*, 110 U. S. 516, enunciated memorable principles in which the criteria of due process were defined. There is nothing obsolete or archaic about those pronouncements. They resound with as much truth and eloquence today as when they were announced. The court declared:

> "Law is something more than mere will asserted as an act of power. It must not be a special rule for a particular person or a particular case, but, in the language of Mr. Webster in his familiar definition, 'The

general law, a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial * * *.'"

Respectfully submitted,

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(5219)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 613

INLAND EMPIRE DISTRICT COUNCIL, LUMBER AND SAWMILL WORKERS UNION, LEWISTON, IDAHO; LOCAL 2679, LUMBER AND SAWMILL WORKERS UNION, BOVILL, IDAHO; LOCAL 2664, LUMBER AND SAWMILL WORKERS UNION, CLEARWATER, IDAHO; LOCAL 2766, LUMBER AND SAWMILL WORKERS UNION, POTLATCH, IDAHO; LOCAL 2684, LUMBER AND SAWMILL WORKERS UNION, LEWISTON, IDAHO; LOCAL 2923, LUMBER AND SAWMILL WORKERS UNION, COEUR D'ALENE, IDAHO; AND HARRY HAINES, POTLATCH, IDAHO, INDIVIDUALLY AND AS PRESIDENT OF INLAND EMPIRE DISTRICT COUNCIL,

Petitioners,

vs.

HARRY A. MILLIS, INDIVIDUALLY AND AS CHAIRMAN AND MEMBER OF THE NATIONAL LABOR RELATIONS BOARD, GERALD D. REILLY, INDIVIDUALLY AND AS MEMBER OF THE NATIONAL LABOR RELATIONS BOARD, AND JOHN M. HOUSTON, INDIVIDUALLY AND AS MEMBER OF THE NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF PETITIONERS

GEORGE E. FLOOD,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 613

INLAND EMPIRE DISTRICT COUNCIL, LUMBER AND SAWMILL WORKERS UNION, LEWISTON, IDAHO; LOCAL 2619, LUMBER AND SAWMILL WORKERS UNION, BOVILL, IDAHO; LOCAL 2664, LUMBER AND SAWMILL WORKERS UNION, CLEARWATER, IDAHO; LOCAL 2766, LUMBER AND SAWMILL WORKERS UNION, POTLATCH, IDAHO; LOCAL 2684, LUMBER AND SAWMILL WORKERS UNION, LEWISTON, IDAHO; LOCAL 2923, LUMBER AND SAWMILL WORKERS UNION, COEUR D'ALENE, IDAHO; AND HARRY HAINES, POTLATCH, IDAHO, INDIVIDUALLY AND AS PRESIDENT OF INLAND EMPIRE DISTRICT COUNCIL,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF PETITIONERS

Opinions of the Courts Below

The District Court for the District of Columbia, Honorable T. Alan Goldsborough, Judge, entertained the complaint of the petitioners seeking by virtue of the absence of

a fair hearing prior to the conduct of an election, to set aside an order of certification issued by the National Labor Relations Board and overruled the respondents' motion to dismiss. The District Court's unreported opinion was rendered April 5, 1944 and is found in R. 15, 16.

Following the rendition of the District Court's order the Board applied for and was granted an order allowing a special appeal to the United States Court of Appeals for the District of Columbia, pursuant to Title 17, Section 17-101 of the District of Columbia Code (R. 18). After considering briefs and hearing argument, the Court of Appeals in a divided opinion, Justices Edgerton and Miller for the majority, Chief Justice Groner dissenting, reversed the court below and directed dismissal of the petitioners' complaint in equity. The opinion of the Court of Appeals (majority and dissenting opinions) appear R. 20 and 21 and are reported 144 Fed. 2nd 539. Said decision was rendered July 24, 1944 and petitioners filed their petition for certiorari on October 19, 1944. Certiorari was granted by this court December 4, 1944.

Jurisdiction

Petitioners grounded their action below upon the original jurisdiction conferred upon Federal courts of controversies arising under the Constitution and laws of the United States (28 U. S. C. A. 41) (1) over all "suits and proceedings arising under any law regulating commerce" (Judicial Code, 24 (8); 28 U. S. C. A. Sec. 41 (8), and upon the jurisdiction with which courts of the United States are endowed under the terms of the Constitution itself, Article III, Sec. 2.

The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code, as amended; Supreme Court Rule 38, par. 5 (b) and 5 (c).

Statutes

The statutes invoked are the National Labor Relations Act, 29 U. S. C. A. 151, *et seq.*, especially 29 U. S. C. A., Sec. 159 (c). Pertinent sections are set out in Appendix A, together with applicable rules of the National Labor Relations Board governing its construction and application which, under recognized canons of construction, become incorporated as governing provisions of the law unless wholly inconsistent with statutory language.

Statement of the Case

This is a suit for equitable relief (mandatory injunction) from acts and orders of the National Labor Relations Board alleged to be in plain contravention of the Act of Congress creating the Board and charting its authority. The complaint is on behalf of five local unions, and Inland Empire District Council, an organization of numerous such local unions, all affiliated with the United Brotherhood of Carpenters and Joiners of America and the American Federation of Labor, and Harry Haines, individually and as president of said District Council. The membership of the five local unions involved are employees of Potlatch Forests Inc., a corporation engaged in the lumber and sawmill industry in the State of Idaho. Three of these local unions represent employees in the company's sawmills located at Lewiston, Coeur d'Alene and Potlatch, Idaho. The other two embrace employees in logging operations at Bovill and Headquarters, Idaho. These five labor unions had for years represented the employees of the company in these five operations.

The petitioners in their cause of action complain that the Board conducted a representation proceeding upon the petition of the Congress of Industrial Organizations (hereafter referred to as the CIO), ordered and held an election,

and certified the CIO as the collective bargaining representative, without according to these petitioners a hearing upon due notice, all of which is alleged to be in violation of the specific mandate of Congress in the National Labor Relations Act (29 U. S. C. A. Sec. 159 (c)), and in violation of the due process clause of the Constitution of the United States (Amendment V). (Par. 19, 20 and 26 of the Complaint, R. 5, 6 and 10).

Coupled with the cause of action for equitable relief is one for declaratory judgment declaring the proceedings of the Board in the absence of a hearing vouchsafed by statute and guaranteed by the Constitution ultra vires and void, and decreeing the Board's certification of the CIO based thereon invalid. Declaratory Judgments Act, 28 U. S. C. A., Sec. 400, Appendix B.

The complaint (R. 1) alleges that, in March 1943, three locals of the CIO filed with the Board petitions requesting certification as bargaining representative of the employees in three of the five operations of the company, contending that the employees of each of the three operations constituted separate and distinct appropriate bargaining units. A hearing on those three petitions was held by the Board at Lewiston, Idaho, May 14, 1943. The Board thereafter found the units sought in the petitions of the CIO inappropriate for the purpose of collective bargaining and dismissed the petitions.[1] Upon the dismissal thereof that particular proceeding was terminated.

Accepting such decision as final the CIO thereupon filed a new petition, seeking certification in a single unit alleged to include certain employees in all five of the company's operations, and a month later followed this with a motion requesting that the cases theretofore dismissed be reopened

[1] In the matter of Potlatch Forests, Inc., and I.W.A.-C. I. O., 51 N.L.R.B. 288.

and that their petition be treated as an amendment to the original petitions, and that an order be entered peremptorily by the Board directing the holding of an election without affording a hearing on the new petition (R. 4).

Thereupon the Board granted the motion of the CIO, over the objection of these petitioning AFL unions, and issued an order directing the holding of an election in a single unit composed of certain employees in all five plants of the company (including the two plants located at Potlatch and Coeur d'Alene, which were not included in the units sought by the CIO in its original petitions), all without affording a hearing or notice of hearing on the new issues involved.[2] The new issues included whether a question concerning representation had arisen since the dismissal of the former petitions, whether it should be resolved by an election, whether a determination was barred by a valid subsisting contract or for other reasons, and particularly the extent of the appropriate unit and the question of which classifications of employees should be permitted to vote in the election.[3] The last question was particularly important because some classes of employees were employed only at the Potlatch and Coeur d'Alene plants which were not involved in the first petitions. Other new and incidental questions included the date and places for the election, the payroll date to be used in determining eligibility to vote (which is particularly important where, as here, a large turnover is involved), whether a large number of employees absent in military service possessing employment status and seniority rights should be permitted to vote, and the form of the ballot. All these matters must be determined at or after a hearing but no hearing was allowed on this petition. The record made of the hearing of the former

[2] In the Matter of Potlatch Forests, Inc. and I.W.A.-C. I. O., 52 N.L.R.B. 1377.

[3] See Complaint, R. 7 and 8.

petitions involving different issues was necessarily wholly inadequate for the purpose, but nevertheless the Board arbitrarily determined the new issues without hearing or notice of hearing on the new petition.

The Board, without a hearing, determined which classifications of employees should be excluded from the election, as well as the other issues involved, with the result that the CIO secured a majority. Such majority, however, was less than 50% of the employees eligible to vote under the Board's order.

After the election and as a result of the continued protest of these petitioning AFL unions that a hearing and due process had been denied, the Board, on motion to reconsider and vacate its Decision and Direction of Election, granted a hearing but refused to vacate its Decision and Direction of Election. However, the hearing held after the election was manifestly insufficient especially since the extent of the unit and the employees eligible to vote must be determined before the election. Based upon the result of this election, the Board issued its orders certifying the CIO as collective bargaining representative.[4]

The complaint (R. 1) by appropriate allegations alleges this conduct and procedure to be arbitrary and capricious, specifically contrary to Sec. 9 (c) of the National Labor Relations Act, Sec. 3 of the Rules and Regulations of the Board, and violative of Amendment V of the Constitution. It spells out a clear trespass by the Board on the constitutional concept of due process, by pleading that no notice of the new issues was served on the parties concerned. No hearing on the issues was tendered to the parties affected, nor was a hearing on the issues so framed ever held.

Following the certification of the CIO as collective bargaining representative, petitioners filed their complaint in

[4] Potlatch Forests, Inc., 55 N.L.R.B. No. 44.

the District Court. The Board moved to dismiss which motion was overruled. The Board then appealed by special appeal to the Court of Appeals for the District of Columbia, which reversed the lower court and ordered a dismissal of the complaint. Your petitioners sought a review and reversal of that judgment and this Honorable Court granted certiorari December 4, 1944.

Specification of Errors

1. The Court of Appeals for the District of Columbia in its opinion by a divided court, erred in holding that the District Court has no jurisdiction of the present suit.

2. The Court of Appeals for the District of Columbia erred in reversing the ruling of the District Court and in ordering a dismissal of the complaint herein.

Question Presented

Does the United States District Court have jurisdiction to review a proceeding of the National Labor Relations Board, judicial or quasi judicial in nature, for the purpose of insuring those requisites of a fair hearing and of due process enjoined upon the Board by the statute creating it and by the Constitution alike, where the complaint sets forth an infringement of the statutory mandate of a fair hearing and a violation of the constitutional requirement of due process?

Summary of Argument

In brief petitioners do not contend that the court can assume the discretionary function of the Board to determine bargaining units or questions of representation. However, the Board in doing so must comply with the requirement of the statute and grant a fair hearing upon due notice consistent with the constitutional requirements of due process.

Inasmuch as the elections are resorted to for the specific purpose of determining the choice of representatives, such a hearing must be held prior to the election. This is logically necessary, because important functions of a hearing are to determine whether an election shall be held and what employees shall be permitted to participate in the election. Numerous other issues arising at the hearing must from the very nature of the proceeding be determined prior to the election. To refuse a hearing prior to the election, as was done in this case, is a denial of due process.

When a new petition or case is filed before the Board, the want of a hearing cannot be obviated by merely re-opening former cases involving different issues and adopting the record of the former hearing as a substitute for the hearing required by the statute and rules of the Board. There is no substitute for due process. Petitioners were entitled to a hearing because required by statute and because the Board by amendment changed the issues entirely, and decided the case on issues on which the respondents had received no hearing or notice of hearing. Such proceedings do not conform with the requirements of the Act or the Constitution as shown by the legislative history of the Act. When the Board acts beyond its authority and *ultra vires*, its actions are subject to restraint by a court of equity.

The Act is silent on the question of judicial review in representation cases, but the District Court had general equitable jurisdiction as held in *American Federation of Labor* v. *Madden*, 33 F. Supp. 943, a decision rendered after the case had been passed on by the Supreme Court of the United States and the Court of Appeals for the District of Columbia. The *Switchmen's* cases recently decided by the Supreme Court of the United States are to be distinguished, because a question of procedural due process is

involved here. Since the Board, according to the complaint (which must be accepted as true as to matters well pleaded), arbitrarily refused a hearing, rendered its decision, held an election and issued an order of certification in a manner violative of due process, such certification must be set aside.

The District Court correctly denied the motion to dismiss and affirmed jurisdiction under the general provisions of the Judicial Code. Because Congress in the National Labor Relations Act provided a special exclusive review of complaint cases does not warrant the conclusion that it thereby intended to exclude a right of review in representation cases. The care manifested in the Act to protect against abuse negatives any purpose to remove the right to a fair hearing from judicial protection. This right will be judicially protected when all remedies available before the Board have been exhausted.

While the respondents have a wide discretionary authority with which we do not here complain, they are, nevertheless, subject to the controlling supervision of the court where constitutional questions of due process are involved. Although respondents manifestly are possessed of a degree of expertness in the field committed to them, still the courts are possessed of superior competence to decide questions such as that presented here, and the courts will not abdicate the functions committed to them by a Democratic government.

The equity jurisdiction of the court provides the appropriate forum for the determination of the issues raised by the complaint.

Since the issues are within the competence of the court to decide, we submit the court should protect the petitioners from the unwarranted arbitrary and illegal actions of the respondents and reverse the lower court.

ARGUMENT

I

Introductory Statement

Throughout this litigation the Board has steadfastly resisted petitioner's efforts to obtain judicial review with respect to whether or not its procedure conformed with the command of Congress that an appropriate hearing be granted and complied with the constitutional requirement of due process. The Board adopts the position that Congress has, although not in terms, nevertheless *sub silentio*, withdrawn resort to the courts of the United States and has reposed conclusive finality upon any procedure that the Board elects to pursue.

The Board relies heavily on the fact that Congress provided an appellate review of complaint cases, charging unfair labor practices under Section 10 of the Act (29 U. S. C. A. 160), (modeled much in the pattern of the Federal Trade Commission Act) but omitted to establish such appellate procedure in representation cases under Section 9 (29 U. S. C. A. 159). It should be noted that the review provided in complaint cases is a special, expeditious and exclusive review in the United States Court of Appeals. The Board assumes that by not specifically providing for a review in representation cases, a conclusive Congressional intent to exclude resort to traditional equitable jurisdiction of courts of the United States, was evidenced, and that it was the purpose of Congress to repose finality in all the administrative acts and decisions of the Board in representation proceedings, even in matters relating to the solution of judicial questions of a constitutional nature.

The Board bases its argument upon the decision of this court in the *Switchmen's* and related cases,[5] and seeks to convert the fact finding finality accorded the National Mediation Board in that case into a finality equally as conclusive in favor of the National Labor Relations Board, even though failure to afford a fair hearing accorded by the statute and failure to conform to constitutional due process are involved. We submit that nothing in the decisions of this court precludes courts of the United States from exercising their paramount judicial prerogative over all matters arising under the Constitution and laws of the United States.

We freely concede that Congress has in many instances gone far, in some instances very far, to invest administrative bodies with sweeping and perhaps conclusive administrative and fact finding functions, but that does not for a moment militate against the right of the judiciary to continue to exercise its jurisdiction to review and to enforce statutory and constitutional rights and sanctions, such as those in issue under the pleadings in the instant case. Courts do not substitute their judgment, and we are not here asking the courts of the United States to do so, upon technical, scientific, factual and accounting matters, for that of the administrative specialists provided for that purpose. We merely urge—and that and nothing more is involved herein—that administrative bodies be limited to the extent only that they may be restrained from substituting their summary informal and executive judgment upon judicial, and particularly constitutional questions, for that of the members of the judiciary specially trained and selected for that particular function to whom the Constitution and Congress have specially committed the task.

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[5] *Switchmen's Union of N. A. v. N.M.B.*, 320 U. S. 297; *General Committee of Adjustment v. M.K.*, 320 U. S. 323; *General Committee of Adjustment v. S. P.*, 320 U. S. 338; *General Grievance Com. v. Genl. Com. of Ad.*

II

The Absence of Specific Provision for Review in the National Labor Relations Act Does Not Preclude Resort to Traditional Remedies for Relief in Equity.

This Court held in the case of *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, that the review provisions of the National Labor Relations Act did not encompass a representation case such as here presented. With respect to a proceeding involving only certification of collective bargaining representatives, Congress was silent in so far as review was concerned. Congress did provide for a judicial review of representation proceedings by petition to the Circuit Court of Appeals of the United States when an unfair labor practice order of the Board is based upon such certification proceeding, and the record of the investigation shall be included in the entire record in such cases (Sections 9(d), 10(e) and 10(f), National Labor Relations Act). This Court, however, rendered clear in that decision that the absence of specific statutory provisions for review does not necessarily preclude the applicability of traditional remedies for relief in equity, and the existence of such a remedy was adverted to by the Court of Appeals for the District of Columbia in that case. *American Federation of Labor* v. *National Labor Relations Board*, 103 Fed. (2) 933. This Court reserved decision thereon for some proper occasion, such as is presented by the record in this case, and indicated that a certification is a final order.

If the District Court does not have jurisdiction of the cause of action set forth in the complaint herein, then your petitioners are denied all right of appeal, and appeal is likewise denied in all representation cases in which the employer recognizes the validity of the certification of the

Board or in which the Board fails or refuses for any reason to prosecute the employer for unfair labor practices in refusing to bargain with the certified representative. The Board has full discretion to refuse to prosecute such a case. *Progressive Mine Workers* v. *National Labor Relations Board* (C. A., D. C. 1940), 3 Labor Cases 60,393; *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 60 S. Ct. 561, 2 Labor Cases 29. Thus, if relief in equity in the District Court is denied, appeal in any representation case must depend upon whether or not the Board issues a complaint and prosecutes to conclusion the employer for refusal to bargain. To impute such an intent to Congress would be manifestly unwarranted.

The provision of the Act (Section 10(a)) relied upon by the court in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (a complaint case), giving exclusive jurisdiction to the Board, by its terms applies only to complaint cases in prosecutions for unfair labor practices before the Board. Hence, there is no statute or decision of this Court foreclosing the traditional remedy in equity in the District Court, and such a review cannot be denied by inference when generally afforded by constitutional and statutory provision.

The remedy where due process is involved is committed to the judiciary.

> "The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States and treaties made, etc., * * *."
> (Constitution, Article III, Section 2.)

To the extent to which the Constitution in such respects may not have been deemed executory, Congress implemented the provisions thereof by passage of the Judiciary Act, an enactment of the Judicial Code endowing the courts

of the United States with the power to hear and determine all suits and controversies arising under the Constitution.

> "The District Court shall have original jurisdiction as follows: (1) of all suits of a civil nature at common law or in equity * * * where the matter in controversy (a) arises under the Constitution or laws of the United States." (Judicial Code, Sec. 24, 28 U. S. C. A., Sec. 41(1)).

Again:

> "of all suits and proceedings arising under any law regulating commerce." (28 U. S. C. A. 41(8)).

Conceding that Congress provided no judicial remedy within the Act for redress of a failure to grant a hearing conformable to the concept of due process, certainly it cannot be said that Congress thereby intended to withdraw judicial remedy. The power to do so is beyond the competence of Congress. The power to extend judicial protection stems directly from the Constitution itself. Congress may either expressly or *sub silentio* withdraw judicial review of an infinite variety of administrative procedures under this or any other act. It cannot, however, withdraw the power of the judiciary to enforce the constitutional sanction of a fair hearing or due process and this obviously for the reason that it is not competent thus to repeal or to rescind substantive provisions of the Constitution. In brief, the rule of the *Switchmen's* case and cognate cases may be taken to apply to procedural processes where the Board acts administratively in its legislative function, but can have no application wherever the Board is charged with infringing or encroaching upon basic constitutional rights. Such a construction would render the Act unconstitutional, and it is familiar law that the courts will impute no such intent to Congress. Hence, this Court will, we feel justified in submitting, indulge no intention on the part of Congress

to withdraw judicial protection for the enforcement of a fair hearing and of due process, no matter how much such an intent may have been implied where purely administrative and legislative procedures, such as those comprehended under the Railway Mediation Act and the *Switchmen's* cases, are concerned. We are confident that this Court will not read into the Act that which is not there, namely, the intendment to suppress the constitutional guarantee of judicial protection of due process. It would be intolerable to give high judicial sanction to a premise that Congress may freely withdraw resort to judicial review of a question which involves the essential requisites of due process or other constitutional guaranty.

For all purposes in this case, we may freely concede under principles elucidated in the *Switchmen's* and cognate cases hereinafter discussed that judicial review by Congress was totally withdrawn by the Railway Labor Act and analogous legislation as to all procedures purely legislative or administrative, particularly so where the agency involved proceeded within the scope of the authority committed to it by Congress. In such circumstances, Congress may properly evince an intent to invest exclusive procedural power over the subject matter in the agency in question and courts will properly respect such intent.

But this leaves unaffected and undisposed of the vital question not involved and presented in the *Switchmen's* and related cases, that is, the question whether Congress intended to suppress a judicial remedy and judicial relief for the protection of the constitutional grant of due process and of a fair hearing, and the further question with respect to whether or not Congress is competent to suppress such judicial remedy. The Court of Appeals, in the opinion of Justices Edgerton and Miller, felt compelled to disallow resort to judicial protection under the construction which it placed upon the *Switchmen's* and related cases. The

majority, in fact, conceived or at least expressed no distinction whatsoever between the power of Congress to suppress the remedy of judicial review of administrative acts and decisions within the *scope of authority committed to the administrative agency by Congress* and the power or want of power in Congress to suppress the remedy of judicial review *in matters relating solely to the constitutional right to a fair hearing and to due process.* This distinction, unappreciated by the majority, was clearly seized by Chief Justice Groner in his dissenting opinion when he expressed emphatic objection to the proposition implicit in the majority's opinion that federal courts, which derive jurisdiction from the Constitution itself, could ever be divested of the power to review and pass upon constitutional questions, such as the adequacy of a fair hearing or of due process.

Let us enumerate and in one or two instances briefly comment upon historic cases of this Court which preserve to the United States courts the province of confining administrative bodies within the statutory limit of their jurisdiction and authority:

Crowell v. *Benson*, 1932, 285 U. S. 22;
State Commission v. *Safety Gas Co.*, 290 U. S. 561;
Ohio Valley Water Co. v. *Ben Avon*, 253 U. S. 287;
Shields v. *Utah-Idaho Central R. R.*, 305 U. S. 177;
United States v. *Idaho*, 298 U. S. 105.

The case last cited involved an interesting question. A condition precedent to the exercise of jurisdiction by the Interstate Commerce Commission was whether the trackage in question came within or without an exception relating to a spur. Despite the I. C. C.'s holding to the contrary, an independent suit in equity before the District Court, wherein it was found to be included within the spur exception, was affirmed. We in our case likewise seek to determine whether the condition of a fair hearing commanded by

Congress was or was not complied with. The case likewise placed a very definite emphasis on the principle that fair hearing including notice and opportunity to meet issues, constituted the essential substance of due process.

United States v. *Abilene*, 265 U. S. 274:

> "Adversary proceedings are of a judicial nature and are governed by constitutional requirements of procedural due process. * * *."

Morgan v. *United States*, 298 U. S. 468 (1936) and 304 U. S. 1 (1938);
Ohio Bell Telephone v. *P. U. C.*, 301 U. S. 292;
St. Joseph's Stockyards v. *United States*, 298 U. S. 38.

There again, this Court announced the rule that courts of the United States may engage in an independent inquiry as to whether rights are confiscatory and violative of due process. United States courts are not bound by findings with respect thereto of an administrative body. Likewise, note its holding that a prerequisite to administrative finality of findings and procedure is compliance with due process and a fair hearing:

> "When the legislature appoints an agent to act within the sphere of legislative authority, it may endow the agent to make findings of fact which are conclusive; provided the requirements of due process * * * are met. * * * Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation." (*St. Joseph's Stockyards* v. *United States*, 298 U. S. 38.)

In the case of *Utah Fuel* v. *National Bit. Coal Com.*, 306 U. S. 56, this Court held with the District Court below that an independent suit in equity for relief would lie in the courts of the United States, although it affirmed the finding of the District Court that the Commission's procedure

was entirely pursuant to its statutory authority, and therefore dismissed the complaint, not because it did not state grounds for relief, but upon its merits. Warrant for the present action is clearly to be found in the language of the Court in that case:

> "Considering the circumstances here alleged, the great and obvious damage which might be suffered, the importance of the right asserted and the lack of any other remedy, we think complainants could properly ask relief in equity (p. 60)."

Kwok Jan Fat v. *White*, 253 U. S. 454. This case is representative of a long series of cases holding that alien Chinese are entitled to the essentials of a fair hearing even in such a summary matter as a deportation case.

C. M. & St. P. Ry. v. *Minnesota*, 134 U. S. 418, illustrating the principle that, where an agency's findings are nonreviewable by statute, the duty is all the more incumbent upon the courts to insure compliance with notice, hearing and due process. Cf. also an opinion by the late Justice Holmes in *Miller* v. *Horton*, 152 Mass. 540, 26 N. E. 100. Likewise, *Kuntz* v. *Sumption* (Ind.), 19 N. E. 474, at 477. Also cases discussed by the late Justice Brandeis requiring notice and hearing in I. C. C. cases in the decision of this Court in *Chicago Junction* cases, 264 U. S. 258, at 263-264; *Columbia Broadcasting Co.* v. *United States*, 316 U. S. 407.

III

Federal Courts Have Jurisdiction to Review Challenged Illegal Acts of Administrative Body

Never has Congress in any enactment explicitly granted even a conclusive *fact-finding* prerogative to an administrative agency without somewhere in the confines of the act evidencing its intent to condition such conclusiveness within the limits of the "substantial evidence rule." Findings of

fact and conclusions which fail to measure up to such a test —"which find no warrant in the record"—"which have no rational basis for decision"—have never been afforded immunity from jurisdictional review. Insofar as Congress has set up a special reviewing procedure for an administrative agency within the provisions of its governing act, it will be noted that with relation to practically every such agency Congress has never failed to incorporate therein the "substantial evidence requirement," thus permitting judicial intervention and review to set aside administrative decisions which fail to conform thereto.[6]

True, these are tests incorporated by Congress to govern and guide the courts in exercising appellate review where appellate review has been established, but they serve also as criteria evincing a congressional purpose to limit the exercise of administrative functions within legal bounds and within statutory authority, and to subject these agencies to judicial correction for arbitrary and illegal decisions and procedure. If such an intent be so clearly expressed where Congress has provided a review other and different than traditional power in equity, which but for such procedure would govern, certainly there is nothing from which we can conclude an intent on the part of Congress to grant a greater finality to administrative bodies in those instances where Congress omits to establish any new and different form of review. It may logically be assumed in the absence of affirmative evidence to the contrary that Congress intended

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[6] Cf. *I.C.C.* v. *Union Pac.*, 222 U. S. 541, 28 U.S.C.A. 14-48, Urgent Deficiencies Act; 15 U.S.C.A., Sec. 41, 45, Federal Trade Commission; 15 U.S.C.A., Sec. 77, Securities Act, 1933; 29 U. S. C. A., Sec. 210, Wages and Hours Act; 16 U.S.C.A., 825, 1(b), Federal Power Act; 15 U.S.C.A., Sec. 78(y), Securities Exchange Act, 1934; 33 U.S.C.A., Sec. 92(b), Harbor Workers Compensation Act, 1940; Note also several similar statutes establishing the prima facie evidence test, 45 U.S.C.A., Sec. 151, 153, Railway Labor Act; 7 U.S.C.A. 499 (c), Perishable Commodities Act; 7 U.S.C.A., Sec. 210, Packers and Stockyards Act.

the traditional exercise of equitable jurisdiction to correct illegal acts of administrative bodies to remain unimpaired except in those instances where it has provided otherwise, or where as in the *Switchmen's* case a clear congressional intent to confer administrative finality is discoverable. But again as we have contended elsewhere, we reiterate for the sake of clarity our position that nothing whatsoever in the *Switchmen's* case can justify the slightest inference or assumption that either Congress or this court would permit the agency there involved or any other agency to defy Congress, violate a congressional demand and to infringe a constitutional prerogative, and yet hide behind a cloak of judicial immunity. That case does not nor was it intended to extend beyond the factual content therein involved.

It is not without significance that the National Labor Relations Act itself contained a special procedure for review for complaint cases charging unfair labor practices under Section 10 (29 U. S. C. A. 160 (e)) which specifically prescribed the substantial evidence test as one necessary to be met in order to entitle the Board's decisions to conclusiveness. So far, therefore, as Congress has spoken on the subject and whenever it has done so it has consistently evinced an intent to safeguard against arbitrary and illegal action and an exercise of unconstitutional power. There is therefore no warrant for leaping to the conclusion that failure of Congress to implement the National Labor Relations Act with a special procedure for review of Section 9 cases, such as that provided for cases under Section 10, gives rise to an inference of congressional intent to suppress any and every mode of review whatsoever. Such an inference and conclusion does not follow from a plain construction of the decided cases of this court.

On the contrary, we need but to point out that the suppression of a traditional and pre-existing remedy for judicial protection from arbitrary administrative action will

never be presumed. If it is to be found at all, it is necessary that such suppression be derived from clear and affirmative evidence of a congressional purpose to do so. But more than that, in a case such as this involving a clear-cut issue over the denial of a constitutional right to a fair hearing, we are not warranted in trifling with inferences, presumptions or suppositions. We must chart our course by recurring to the Constitution itself and to the fundamental guarantee contained therein, preserving the right of the judiciary to enforce constitutional rights and sanctions.

As a matter, therefore, of sound and simple logic, it must be concluded that insofar as Congress provided no special mode of appellate review for Section 9 cases, it deliberately left unimpaired the power frequently and traditionally exercised by the federal judiciary to restrain illegal acts, and to do so particularly wherever such acts constitute an invasion of due process and a denial of a congressional demand for fair hearing. By omitting a provision for special mode of review, Congress *ipso facto* by necessary implication reads into the act those remedies traditionally available to afford protection against an unconstitutional and illegal assertion of power by an administrative agency.

Even in cases involving pensions, gratuities and compensation under statutes rendering the agency's decision final, the door has always been left open for judicial intervention in courts of equity to correct illegal administrative action or acts *ultra vires*. That is, reviewability in courts of equity has been maintained in those cases where administrative decisions are "wholly unsupported by the evidence or wholly dependent upon a question of law, or seem to be clearly arbitrary and capricious." See *Medbury* v. *U. S.*, 173 U. S. 492; *U. S.* v. *Laughlin*, 249 U. S. 440; *Silverschein* v. *U. S.*, 266 U. S. 221; *U. S.* v. *Williams*, 278 U. S. 255; cf. *U. S.* v. *Meadows*, 281 U. S. 271.

In those cases courts were dealing with statutes containing express language serving clearly to negative any

intent by Congress to permit judicial intervention. The statute in our case contains no express or affirmative language even so much as intimating such congressional intent, nor is there conversely language in the act serving to confer complete finality on the N. L. R. B. In fact it is not without significance, and perhaps of a great deal more importance than has hitherto been supposed, that the Act contains only one notable grant of exclusive power to the Board. That is the power under Section 10 to "prevent any person from engaging in any unfair labor practice * * *. This power shall be *exclusive*, * * *." 29 U. S. C. A. 160(a). Even as to this exclusive power, Congress provided a special statutory mode of review to insure judicial safeguards against illegal and arbitrary action. Is it not, therefore, incontestable that where Congress provided by statutory command that the Board should grant a hearing as a condition to the exercise of its power under Section 9 to investigate representation disputes, and to conduct elections, that it likewise intended to safeguard the grant of that high prerogative by implementing the power and the general jurisdiction of courts of equity to restrain administrative agencies from violating a statutory command, departing from its authority and infringing upon constitutional rights. This conclusion seems irresistible in the light of the caution which Congress manifested in Section 10 by subjecting its grant of exclusive power to judicial review as protection against illegal and arbitrary action.

IV

Jurisdiction in Equity Lies Where Administrative Action Is Directly Injurious to Legally Protected Interest of the Plaintiff.

In the recent much discussed case of *Employers Group Motor Freight Carriers* v. *National War Labor Board*, C. A., D. C., 143 Fed. 2d 145, Justice Edgerton indulged

in an interesting analysis of cases in which the Supreme Court has sustained suits not specifically authorized by statutes to annul or enjoin alleged illegal administrative action, and he classified them: (1) administrative action directly injurious to legally protected interests of the plaintiff, and (2) administrative action furnishing a basis for probable judicial proceedings against the plaintiff. (He adverted to a possible third classification involving review on general equitable principles of the administrative exercise of rule-making power.) It is certainly most clear that we complain of illegal administrative action on the part of the Board in refusing a hearing in a proceeding threatening to deprive petitioners of their existence and of their status as collective bargaining representatives, so that in no wise can it be doubted that we fall clearly within the ambit of this first classification and the cases cited therein.[7]

Our right to a fair hearing and to constitutional due process from an administrative agency, such as the N. L. R. B., involving a matter so vital to us as the terms of our collective bargaining status, is a justiciable personal right of a character and dignity, if anything, more important than pecuniary rights which this court held subject to vindication in courts of equity, even in the absence of a statutory provision for judicial review. In the important case of *Stark* v. *Wickard*, 88 L. Ed. 510 (Feb. 28, 1944), this court, speaking through Justice Reed, said:

> "It is only when a complainant possesses something more than a general interest in the proper execution of the laws that he is in a position to secure judicial intervention. His interest must rise to the dignity of an interest personal to him and not possessed by people generally. Such a claim is of that character which con-

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[7] *U. S.* v. *Lee*, 106 U. S. 196.
Waite v. *Macey*, 246 U. S. 606.
Am. School of Magnetic Healing v. *McAnnulty*, 187 U. S. 94.
Utah Fuel v. *Nat. Bit. Coal Com.*, 306 U. S. 56.

stitutionally permits adjudication by courts under their general power.

"We deem it clear that on the allegations of the complaint these producers have such a personal claim as justified judicial consideration. It is much more definite and personal than the right of complainants to judicial consideration of their objections to regulations which this court upheld in *Columbia System* v. *U. S.*, 316 U. S. 407. * * *

"To reach the dignity of a legal right in the strict sense, it must appear from the nature and character of the legislation that Congress intended to create a statutory privilege protected by judicial remedies."

And again:

"Without considering whether or not Congress could create such a definite personal statutory right in an individual against a fund handled by a federal agency, as we have here, and yet limit its enforcibility to administrative determination, despite the existence of federal courts of general jurisdiction established under Article III of the Constitution, the congressional grant of jurisdiction of this proceeding appears plain. There is no direct judicial review granted by this statute for these proceedings. The authority for a judicial examination of the validity of the secretary's act is found in the existence of courts and the intent of Congress as deduced from the statutes and precedents as hereinafter considered."

V

The Decision Below Misconceives the Scope and Purport of Decision in Switchmen's and Similar Cases and, Taking It From Its Context, Transposes It to Apply to Constitutional Questions of Due Process Not Involved Therein.

The *Switchmen's* case arising under the state of facts involved therein, as we have heretofore touched upon, is

no barrier to the exercise of equitable jurisdiction by the courts of the United States under the circumstances presented here.

The question for this Court's determination is whether the majority below was correct in its assumption that the *Switchmen's* and kindred cases were intended by this Court to constitute the Alpha and Omega of all law upon the subject of administrative agencies, such as the Railway Mediation Board and the N. L. R. B. If so, was the majority below justified in assuming that this Court in that decision intended to lay down the broad and universal proposition that the courts of the United States are powerless to intervene in equity to protect the enforcement of constitutional rights?. Is it necessary for the courts of the United States to conclude that that case was intended to announce a principle that action and decisions of administrative agencies, even on constitutional questions, so far supersedes the traditional remedies in equity provided by the judiciary act as to leave such constitutional rights wholly to the mercy of administrative bodies?.

It will be perceived that this presents another and a different question than that at issue or that decided in the *Switchmen's* and similar cases. That case did not require that its rule, however appropriate there, should be extended to cover all administrative decisions so as to render them forever final, irrevocable and non-reviewable even though they deal with constitutional questions. To enthrone administrative bodies with such a degree of administrative finality in judicial and administrative questions would be to confer upon them a revolutionary autonomy wholly out of place in our system of jurisprudence. It would be a step not in the slightest extent foreshadowed or suggested in the *Switchmen's* case. The distinction between the integrity of the judicial function so far as necessary to preserve and integrate constitutional privileges, rights and

sanctions on the one hand, and administrative function on the other, constitutes a sharp line of demarcation between the American democratic process and the continental system of executive absolutism.

Since, however, the Board at all times and the majority of the court below, in its divided opinion, rested their thesis throughout upon what they supposed to be the conclusion of the *Switchmen's* case, compelling the Federal judiciary to stand aside in the face of administrative decisions under any and all circumstances, let us then devote a brief examination to that case. Its factual content related, as did its companion cases, to jurisdictional disputes over claimed rights to represent employees of a railway. The undisputed province of the Board was that of designating the bargaining agency. So long as the Board discharges its statutory duty, employees were bound by its findings as to which organization represented a majority. The Board's acts *intra auctoritate* were final. In that case due process was admittedly afforded and the question present in ours was absent there. This Court held under such circumstances that the Board's discharge of its administrative function was non-reviewable, that it was intended to be so by Congress, and that the courts could not substitute their judgment for that of the Board. Similarly, we too may concede that had we received that notice and that hearing commanded by Congress, we likewise would be bound by the procedure of the Board and would have no complaint cognizable in the courts of the United States.

We, however, have a concrete, specific right to a hearing which was infringed and denied. The *Switchmen's* case did not purport to close the door to such circumstances. Justice Douglas, speaking for the court, recognized the power of the judiciary to vindicate rights of a fundamental character which otherwise would be obliterated.

Note the careful blueprint which he laid down in order to insure that no vital constitutional right should ever be sacrificed to a summary administrative process:

> "If the absence of jurisdiction of federal courts meant a sacrifice or obliteration of a right which Congress has created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control (cases) * * * In those cases it was apparent that but for the general jurisdiction of federal courts, there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act."

In a later case from this Court, that of *Stark* v. *Wickard*, 321 U. S. 288, a great deal of light was cast upon the operative scope of the *Switchmen's* decision. From a reading thereof, it is manifest, we submit, that this Court reiterates the propriety of extending judicial protection to all cases where, but for the jurisdiction and the relief available in Federal courts of equity, no means might otherwise be found for the enforcement of valuable granted rights. In that case where there was absent statutory scheme of review, this court none the less had no hesitancy in invoking a general equity power to restrain the Secretary of Agriculture from making certain deductions extrinsic to statutory authority.

Here too we have a right to notice and hearing founded on an express command of Congress. Note Justice Reed's language in *Stark* v. *Wickard* (pages 309-10):

> "When definite personal rights are granted by federal statute * * * the silence of Congress as to judicial review is, at any rate in the absence of an administrative remedy, not to be construed as a denial of authority to an aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction. When Congress passes an act empowering administrative agencies to carry on governmental

activities, the power of those agencies is circumscribed by the authority granted. This permits courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory authority in such instances is a judicial function entrusted to the courts by Congress by statutes establishing courts and marking their jurisdiction * * * Under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights, whether by unlawful action of private persons or by the assertion of unauthorized administrative power."

We are mindful of the decisions of the Court of Appeals, cited by the majority below as authority for its refusal to authorize intervention by a court of equity. That they are not applicable here, we think clearly appears from a reference to their facts and holdings.

We may conclude this discussion of the subject, therefore, by a reference to our constitutional and statutory right to notice and a fair hearing. This is a right which may not be trifled with by an administrative body, nor may such body whittle it away to suit its own pleasure or fiat.

It is a right possessing a definite connotation of judicial definitions, and the granting thereof is rendered a condition precedent by the command of Congress imposed upon the Board *in limine* before it may proceed with the exercise of its authority. By affording notice and hearing conformable to due process, the Board has undoubted authority to proceed and may invest itself with administrative finality. By failure thus to accord it, it does not bring itself within the principle of judicial immunity. We, therefore, clearly plead ourselves within every definition admitting judicial protection and relief laid down by this Court.

VI

Distinguishment of Cases Assumed by Court Below to Support Its Construction of Switchmen's Case

A majority of the Court of Appeals, in support of its decision, cited a number of cases as presumably authority for its view that the *Switchmen's* case required it to deny judicial intervention in our case, and in order to demonstrate the nonapplicability of those cases we shall briefly notice their facts and holdings.

First, was the *Order of Conductors of America* v. *National Mediation Board*, C. A., D. C., 141 Fed. 2d 366. The Court of Appeals in that case held the Board immune to judicial review under the rule of the *Switchmen's* case although it criticized the Board for failure to investigate charges of collusion between management and a labor organization, prior to an ordered election. The *ratio decidendi* proceeded upon the premise that the procedure of conducting elections was within the exclusive commitment of Congress. Confined to the fact of that case, we have no quarrel with it. There was no question of due process, fair hearing or constitutional law raised, discussed or decided.

Second, is the case of *Union Transport Service Employees of America* v. *National Mediation Board*, C. A. D. C., 141 Fed. 2d 724. The Board there proceeded to do only that which Congress confided exclusively to its processes, namely, to hold an election. The complaint lodged against the Board related purely to the mode of counting ballots. Though the District Court entertained jurisdiction, the Court of Appeals properly dismissed the complaint under the rule of the *Switchmen's* case. There again no constitutional question of fair hearing or due process was present. Hence the decision has no relevancy whatsoever to our inquiry.

Third, *National Federation of Railway Workers* v. *National Mediation Board*, C. A. D. C., 141 Fed. 2d 725. Again the Board held an election denying voting privileges to a certain group after affording the group a complete hearing. The group thereafter resorted to equity. The district Court dismissed its complaint, the Court of Appeals affirming. No conceivable question of constitutional law was there involved. The matters complained of were manifestly inherent in the investigatory process committed to the Board by Congress and merged in the discharge of its legislative function. The decision can have no bearing on the solution of our problem.

A case much in the mind of the court upon argument and referred to by the majority in its opinion was its own recent War Labor Board Decision: *Employers Group Motor Freight Carriers* v. *W. L. B.*, 143 Fed. 2d 145, Justice Edgerton writing the opinion for the court. That case arose under the jurisdiction of the War Labor Board and the authority of various executive orders and acts of Congress conditioning its processes and procedure. An agency of that Board following investigation and hearings established certain increased wage rates within the area concerned, which in effect were adopted by the Board. The industry complained of the Board's violation of its legal authority in that it erred in considering certain economic factors upon which it predicated its increases. It asserted that such rates, if paid by industry, would produce industrial "failure and dissolution."

The Court of Appeals expressed the opinion that the Board's acts were non-reviewable in the light of the legislative history disclosing a congressional purpose to remove WLB decisions from the periphery of judicial review. Having in mind the context of the Act and the purpose motivating the creation of the WLB, we entertain no

doubt of the propriety of that decision and particularly is this true when we examine the considerations set forth in the opinion in detail, which establish that no possible question of constitutional law was there involved. The court pointed out that none of the acts authorizing War Labor Board procedure conferred upon that Board any enforcement power whatsover. Its directives were "directory only, not mandatory" and "without legal sanction." Industry, therefore, being under no compulsion to pay increased rates was uninjured, unaggrieved.

Nor is there anything in the textual body of the court's discussion of the formula governing judicial review of administrative action, which conflicts with the principle of review which we here seek. Whether we plead (1) administrative action directly injurious to our legally protected interest, or (2) whether our case falls within the orbit of the second category of administrative action furnishing the basis for future judicial proceedings against the plaintiff, is a question unnecessary here to decide. Both grounds for judicial intervention to review administrative action proceed upon the basic proposition implicit in each that courts of the United States, under the command of the Constitution, do not lose power to enforce constitutional sanctions of due process where invasion of basic personal and property rights by administrative action is put in issue even though the governing statute provides no statutory appellate review.

From what we have said, it is therefore necessary to conclude that we in no wise seek to reopen questions put to rest in the *Switchmen's* case. We do not contend for the right of judicial review of administrative acts performed by the agency in furtherance of its congressional powers. What we do contend, however, is that the Board may not refuse us a hearing commanded by Congress, and then an-

swer our demand therefor with the defense that it may safely do so and leave us remediless by virtue of a presumed congressional intent to free the Board from judicial compulsion to obey the law. The Board cannot thus by its own *ipse dixit* place itself above the Congress which creates it. The express grant by Congress of the right to a fair hearing necessarily contradicts the Board's assumption—and the assumption indulged in its favor by the Court of Appeals—that Congress intended to leave the Board unrestrained by any judicial remedy requiring it to comply with law. Implicit in the grant is the correlative thereof of a purpose that the right thus expressly granted be implemented by adequate legal and judicial sanctions of enforcement.

VII

The Board Acted in Violation of the Statute Creating It and Charting Its Authority and in Contravention of the Constitutional Guarantee of Due Process.

Our complaint charges the Board with having failed to grant us a hearing. Whatever the Board's answer may be to this issue, upon its merits, is at this stage of the proceeding immaterial for the motion to dismiss upon the ground that the complaint fails to state a claim upon which relief could be granted, admits plaintiff's allegations and the question is squarely whether or not the Board is free to defy a Congressional command requiring it to grant a hearing upon notice to the parties involved. The statute provides (Sec. 9(c) Appendix A) as follows:

> Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In

> *any* such investigation, the Board shall provide for an *appropriate hearing upon due notice*, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives. (Italics supplied.)

Since it is the purpose of a hearing to determine among numerous other things the extent of the appropriate unit and the employees who will be permitted to participate in any election which may be held, it is obvious that the hearing required must precede the election. This view is supported by the history of the legislation. For example, it is stated on page 14 of the Report of the Committee on Education and Labor of the Senate (accompanying Senate Bill No. 1958, 74th Cong., 1st Sess., N. L. R. Act) that:

> Section 9(b) empowers the National Labor Relations Board to decide whether the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or other unit. Obviously, there can be no choice of representatives and no bargaining unless units for such purposes are first determined. And employees themselves cannot choose these units, because the units must be determined before it can be known what employees are eligible to participate in a choice of any kind.

Moreover, it is crystal clear that the appropriate hearing mandatorily required must be a due process hearing upon due notice affording the parties an opportunity to know the issues and meet opposing claims. That such was the intention of the Congress is clear from the legislative proceedings during the enactment of the law. Almost prophetically, it seems, and out of an abundance of caution, in the final stages of enactment the words "upon due notice" were inserted in Section 9(c) by the Conference Committee; as appears in the Report of Conference Committee

on Senate Bill No. 1958 (74th Cong., 1st Sess., p. 5) which reads:

> House amendment No. 12 inserts the phrase "upon due notice" in section 9(c) providing for hearings by the Board on the issue of collective bargaining representation. The conference agreement accepted this amendment out of abundant caution; though it would perhaps be implied that a requirement of a hearing includes due notice to the parties.

We contend that when the Board resorts to the election process to determine an issue of representation, it must hold a hearing prior to the election, else upon plainest principles of fair play and due process, the result of such election cannot be used as a reliable basis for certification. Not only the Act itself, but the Constitution, requires it. *Federal Administrative Law*, Vom Baur, Vol. 1, Sec. 290.

Since by the election the issue is generally decided for all practical purposes, a hearing after an election is insufficient. By the common practice of the Board, a full hearing upon due notice is held before an election with an opportunity for a supplementary hearing after the election at which questions of challenged ballots and violations of the rules of the election relating to campaigning in the vicinity of the polling place and like questions are normally considered. But in this case the Board refused a hearing prior to its Decision and Direction of Election and conducted the election without it.

The Board may not simply push aside interested parties and hold elections indiscriminately with the promise that a hearing will be held after the election to make sure that no interested party is injured. Such a hearing would not be "an appropriate hearing upon due notice" required by the Act. Not only would such a policy create unlimited confusion, but it would unavoidably and unfairly affect the rights of parties by reason of the announcement of elec-

tion results and the influence thereof in units which might be later found to be inappropriate. It would foster the holding of elections and stir up disputes where no question of representation had been found to exist. It would be the reverse of due process, and would destroy the usefulness of the Board itself by giving it authority to act arbitrarily without an opportunity to exercise discretion based on facts established by evidence.

Likewise the Rules and Regulations of the National Labor Relations Board (Appendix C) having the force and effect of law require the holding of a hearing in every case prior to the election, but the Board violated its own rules. If resort to judicial intervention be withdrawn, the Board in setting up its own procedure is judge not only in administrative and legislative functions which it may discharge, but of constitutional questions involved in its procedure. To that extent it may suppress Congressional requirements and to all prayers for relief it need answer only with judicial immunity. This Honorable Court does not sanction any principle which will permit agencies created by Congress to destroy the laws provided for their government.

It requires no extensive citations of authorities to illustrate how cogent and controlling is the construction which the Board itself has put upon its own governing act. See *Dismuke* v. *U. S.*, 297 U. S. 167, stressing the weight and persuasiveness accorded the construction placed upon duties of an administrative agency through the medium of its own rules and regulations; *Edwards Lessess* v. *Darby*, 12 Wheat (U. S.) 206; *U. S.* v. *Alabama G. So. Ry.*, 142 U. S. 615; *Fawcus Machy Co.* v. *U. S.*, 28 U. S. 375; *Norwegian Nitrogen Co.* v. *U. S.*, 288 U. S. 294.

In its brief in opposition to the petition for writ of certiorari, pages 9 and 10, the Board cites a number of cases holding that a hearing need not be held at any particular time in order to fulfill the requirements of due

process. The ruling of these cases, however, is not applicable to the circumstances present here.

These cases with which we have no quarrel relate in most instances to tax statutes. They held constitutional statutes which permit an advisory or preliminary investigation of tax or other liability by an agency of the state, provided that before fixed liability be established, process, notice and full hearing of a judicial character be afforded. Each of these cases involves a statutory scheme permitting a judicial review upon notice and full opportunity to all parties to be heard with respect to the action of some administrative subordinate of the state—a review not available here under Section 9 of the National Labor Relations Act.

Opp v. *Administrator of Hours and Wages*, 312 U. S. 126, much relied upon by the Board throughout these proceedings, is merely an analogous case holding that an industry committee, empowered under the Act to conduct an investigation and make recommendatory reports to the Administrator, does not violate due process where no notice of hearing is afforded by the Committee since the Act provides for a full hearing upon notice to all parties before the Administrator. There the aggrieved party actually appeared and participated at such hearing before the Administrator issued a decision establishing and affecting the rights of the parties. The decision of the Board in our case ordering the conduct of an election, and the actual conducting of an election, was no mere act of an advisory committee. It was an official decision of the Board, which the Board was empowered to make only after service of notice to all affected parties, apprising them of the contents of the petition and the holding of a hearing. Whether an election be held at all or not, or whether it was barred by our contract, who should participate therein and who should be excluded therefrom—these and many others were all issues determinable only after notice or hearing.

It is no answer to say that the Board is free to determine these vital issues without notice or hearing, and then months after grant us a hearing *ex post facto*, after the prejudice occurred and the harm is done. An *ex post facto* hearing is not judicial. It is not what the statute commands. It is not an "appropriate hearing." It is not due process nor does anything in the *Opp* case intimate so. The Board's position would have a certain degree of persuasiveness entirely lacking here had it in fairness, in accordance with judicial procedure, first vacated its order and decision, something which it steadfastly, however, has refused to do. Clinging, therefore, at all times to its decision and order requiring an election, without granting us notice or hearing, it is nothing more than an empty formality to extend to us an *ex post facto* hearing.

In the *Opp* case, it will be noted that before the Administrator acted he gave full notice and granted a complete and formal hearing. In our case the Board decided first to hold an election without notice or hearing, and then belatedly sought to grant us a *nunc pro tunc* substitute therefor. *But there is no substitute for due process.*

The Board in fact treats the manner in which it trifled with the congressional mandate of notice and fair hearing as a mere detail falling within the realm of the doctrine of "*de minimis.*" In its view these are merely empty formalities and minor flaws readily curable by certain ingenious *nunc pro tunc* procedures. It treats it as a mere matter of a clerical omission subject to a subsequent corrective order *nunc pro tunc* entered for the purpose merely of revising the record in order to bring it current and up to date as to adjective or procedural requirements. But the matter here involved is far beyond the confines of the *nunc pro tunc* doctrine.

A procedure of the Board which denies petitioners the essential elements of fairness and the resulting decision is

not merely infected with slight flaws or curable infirmities, but is void in its entirety.[8]

We do regard it as worthwhile to point out that the Board, despite an express disclaimer thereof, nevertheless impliedly by its plea that its procedure is adequate, confesses the power and jurisdiction of the courts of the United States to weigh, consider and determine the effect thereof and to pronounce it invalid if found inadequate, and valid if found sufficient to conform to due process. But it must moreover be noted that in doing so the Board goes further and asks this court to sit as a court of original *nisi prius* jurisdiction to decide the issue in lieu of having it heard upon its merits in courts of original instance where under the Constitution and the judiciary act pursuant thereto jurisdiction thereof is vested.

The writ of certiorari to the Court of Appeals below brings up to this court for decision only one question: Whether or not, as we contend, that court erred in holding that courts of the United States possess no power or jurisdiction to inquire into the sufficiency or insufficiency of the Board's procedure in order to ascertain judicially whether the congressional mandate of a fair hearing and the constitutional requirement of due process have been complied with.

In the case of *A. F. L.* v. *Madden*, 33 Fed. Supp. 943 (U. S. D. C., D. C.), the final chapter in the litigation involved in *A. F. L.* v. *N. L. R. B.*, *supra*, the District Courts assumed jurisdiction. In *Klein* v. *Herrick*, 41 Fed. Supp. 417, and *International Brotherhood of Electrical Workers* v. *N. L. R. B.* 41 Fed. Supp. 57, the District Court also assumed jurisdiction. See also *Inland Empire District*

[8] See New England Division Case, 261 U. S. 184; *Lloyds' Societe* v. *Elting*, 287 U. S. 329; *Saltzman* v. *Stromberg-Carlson*, 46 Fed. 2d 612; *N.L.R.B.* v. *Consolidated Edison*, 305 U. S. 197; *N.L.R.B.* v. *Cowell Portland Cement Co* (9 C.C.A.), 108 Fed. 2d 198; *National Broadcast* v. *F.C.C.* C.A.D.C. (1942), 132 Fed. 2d 545.

Council v. *Graham*, 53 Fed. Supp. 369 in support of the same rule. In the present case petitioners have exhausted all remedies before the Board and the Board's decision and certification are final unless the jurisdiction of the District Court is recognized.

Conclusion.

Courts of the United States have ever been most jealous of preserving a fair opportunity to be heard, wherever by due process or statute it is required. In times past, historic decisions have so clearly defined the essentials of a fair hearing that one should scarcely expect today to see them called in question. Today it is true that an ever-increasing amplitude and degree of autonomy are being extended to administrative bodies to the end that governmental efficiency may not be harassed and embarrassed by interminable and litigious delays. Yet the greater the finality and conclusiveness of the administrative prerogative, correspondingly the greater must be the responsibility of the judiciary to exact a full measure of conformity with principles of fair and just treatment and with due process at the hands of these powerful agencies. Only by doing so may the American process be safeguarded.

We, therefore, contend for the reasons above set forth that the judgment of the United States Court of Appeals for the District of Columbia should be reversed and the cause sent back to the Trial Court for hearing and disposition on its merits.

Respectfully submitted,

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Seattle, Washington,
JOSEPH A. PADWAY,
JAMES A. GLENN,
Washington, D. C.,
Counsel for Petitioners.

APPENDIX A

Statutes Involved

The pertinent provisions of the National Labor Relations Act (49 Stat. 449; 29 U. S. C., Sec. 151 et seq.) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer—

* * * * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

Representatives and Elections

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Prevention of Unfair Labor Practices

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not

less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such a person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence shall be conclusive, and

shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States and upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any Circuit Court of Appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

APPENDIX B

The pertinent provisions of the Federal Declaratory Judgments Act (48 Stat. 955, as amended by 49 Stat. 1027; 28 U. S. C., Sec. 400) are as follows:

> (1) In cases of actual controversy (except with respect to Federal taxes) the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

APPENDIX C

The pertinent provisions of Rules and Regulations of the National Labor Relations Board, Article III, Sections 3, 8 and 9 (Eighth Annual Report of the N. L. R. B., pages 223 and 225) are as follows:

SEC. 3. *Same; investigation by Regional Director; definition of parties; notice of hearing; service of notice.*—After a petition has been filed, if it appears to the Regional Director that an investigation should be instituted he shall institute such investigation by issuing a notice of hearing, provided that the Regional Director shall not institute an investigation on a petition filed by an employer unless it appears to the Regional Director that two or more labor organizations have presented to the employer conflicting claims that each represents a majority of the employees in the bargaining unit or units claimed to be appropriate. The Regional Director shall prepare and cause to be served upon the petitioners and upon the employer or employers involved (all of whom are hereinafter referred to as "the parties"), and upon any known individuals or labor organizations purporting to act as representatives of any em-

ployees directly affected by such investigation, a notice of hearing upon the question of representation before a trial examiner at a time and place fixed therein, provided that when the petition is filed by an employer the Regional Director shall serve the notice of hearing on the employer petitioner and on the labor organizations named in the petition (all of whom are hereinafter referred to as "the parties"), and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation. A copy of the petition shall be served with such notice of hearing.

* * * * * * *

SEC. 8. *Record; what constitutes; transmission to Board.*—Upon the close of the hearing the Regional Director shall forward to the Board in Washington, D. C., the petition, notice of hearing, motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, all of which shall constitute the record in the proceeding.

SEC. 9. *Proceeding before Board; briefs; further hearing; direction of election; certification of representatives.*—The Board shall thereupon proceed, either forthwith upon the record, or after oral argument or the submission of briefs, or after further hearing, as it may determine, to direct a secret ballot of the employees in order to complete the investigation, or to certify to the parties the name or names of the representatives that have been designated or selected, or to make other disposition of the matter. Should any party desire to file a brief with the Board, the original and three copies thereof shall be filed with the Board at Washington, D. C., within seven days after the close of the hearing. Immediately upon such filing, the party filing the same shall serve a copy thereof upon each of the other parties.

INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 613

INLAND EMPIRE DISTRICT COUNCIL, LUMBER AND SAWMILL WORKERS UNION, ET AL., PETITIONERS

v.

HARRY A. MILLIS, INDIVIDUALLY AND AS CHAIRMAN AND MEMBER OF THE NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court of the United States for the District of Columbia (R. 16–17) is unreported. The opinion of the United States Court of Appeals for the District of Columbia (R. 27–28) is reported in 144 F. 2d 539. The supplemental decision and certification of representatives of the National Labor Relations Board is reported in 55 N. L. R. B. 255. Decisions of the

Board in earlier phases of this case are reported in 51 N. L. R. B. 288 and 52 N. L. R. B. 1377.

JURISDICTION

The judgment of the court below (R. 31) was entered on July 24, 1944. The petition for a writ of certiorari was filed on October 19, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether petitioners are entitled to invoke the jurisdiction of the District Court of the United States for the District of Columbia to set aside a certification of representatives made by the Board pursuant to Section 9 (c) of the Act upon allegations that the hearings conducted by the Board in its investigation did not constitute the hearings contemplated by Section 9 (c) of the Act.

A further question urged by petitioners, but which we believe is not here presented, is:

2. Whether petitioners may invoke the jurisdiction of the district court by stating facts to show that the hearings held were inadequate under the due process clause of the Constitution.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151 *et*

seq.) are set forth in Appendix A of the petition for a writ of certiorari, pp. 36–40.

STATEMENT

On March 9, 1943, certain locals of International Woodworkers of America, affiliated with the Congress of Industrial Organizations, hereinafter called the C. I. O., filed petitions with the National Labor Relations Board for investigation and certification of collective bargaining representatives of the employees at each of three of the five logging and milling operations of Potlatch Forests, Inc., hereinafter called Potlatch (R. 3–4). A hearing was held on these petitions on May 14 and 15, 1943, in which both the C. I. O. and petitioners fully participated (R. 4). Petitioners resisted the establishment of three separate units upon the ground that all five of Potlatch's logging and milling operations constituted a single appropriate unit (51 N. L. R. B. 288, 290–291). The Board accepted this contention, specifically finding that bargaining by the employees in all five operations in a single unit would be appropriate (51 N. L. R. B., at 292–293), and, on July 13, 1943, issued its decision (51 N. L. R. B. 288) dismissing the C. I. O. petitions (R. 4).

On July 16, 1943, the C. I. O. filed with the Board a petition for investigation and certification of a collective bargaining representative for employees in a single unit, composed of the em-

ployees in all five of Potlatch's operations (R. 4). On September 14, 1943, the Board issued and served upon petitioners a notice to show cause why the Board should not reinstate the prior C. I. O. petitions, treat the C. I. O. petition of July 16, 1943, as an amendment to the prior petitions, and decide the case without holding a further hearing (R. 5). In response to said notice, petitioners filed their protest and objections in which they stated the conclusion that the Board's failure to hold a further hearing would prejudice them, but failed to show any basis for that conclusion (R. 5–6, 52 N. L. R. B., at 1381). Thereafter, on October 14, 1943, the Board issued its decision and direction of election (52 N. L. R. B. 1377) in which it, first, vacated its prior decision dismissing the C. I. O. petitions and reinstated those petitions, and, second, made the C. I. O. petition of July 16, 1943 a part of the record in the earlier proceedings and treated it as an amendment to the earlier petitions (R. 6). On November 9, 10, 11, and 12, 1943, the Board conducted an election among the employees in the single unit consisting of the five Potlatch operations. In this election, the C. I. O. received 1,118 votes and petitioner, Inland Empire District Council, received 953 votes (R. 9).

On January 11, 1944, petitioners filed with the Board their motion to reconsider and vacate the decision and direction of election, stay the certification, and grant an appropriate hearing (R. 9).

Pursuant thereto, the Board, on January 27, 1944, ordered that a hearing be held with respect to the issues raised by petitioners' motion, and deferred ruling upon petitioners' request that the Board's decision and direction of election and the election itself be vacated until after it had reconsidered the entire record, including the evidence to be adduced at the further hearing (R. 9). On February 18 and 19, 1944, the Board conducted a hearing on the issues raised by petitioners' motion and petitioners fully participated therein (R. 10). Following this hearing, the Board, on March 4, 1944, issued its supplemental decision and certification of representatives (55 N. L. R. B. 255) in which it certified the C. I. O. as the exclusive representative of the employees in a unit consisting of all five of Potlatch's logging and milling operations (R. 10). On March 8, 1944, the Board denied petitioners' motion for reconsideration of the certification (R. 10).

On March 21, 1944, petitioners filed their complaint, in the District Court of the United States for the District of Columbia (R. 1–13), praying for the issuance of a mandatory injunction requiring the Board to set aside its certification of representatives dated March 4, 1944, and, in the alternative, for the entry of a declaratory judgment decreeing said certification invalid and void. The complaint alleged that the certification unlawfully deprived petitioners of valuable bargaining rights and that the hearings held in the course

of the proceedings leading up to the certification neither satisfied the due process clause of the Constitution nor the statutory requirement of a hearing found in Section 9 (c) of the National Labor Relations Act. On March 29, 1944, members of the Board, individually and in their official capacities, filed their motion to dismiss the complaint (R. 13–15), urging that the district court was without jurisdiction of the subject matter of the complaint, and alternatively, that the complaint on its face failed to state a cause of action entitling petitioners to the relief prayed for. The district court, on April 5, 1944, overruled the Board's motion to dismiss with leave to the Board to answer the complaint (R. 17).

The Board, pursuant to Section 17–101 of the District of Columbia Code, filed its petition in the court below for the allowance of a special appeal from the order of the district court of April 5, 1944, overruling the Board's motion to dismiss the complaint. On May 15, 1944, the court below entered an order allowing the special appeal (R. 25) and on July 24, 1944, upon consideration of the appeal, reversed the order of the district court and remanded the cause to that court with directions to dismiss the complaint (R. 31).

ARGUMENT

1. Petitioners contend that the two hearings held by the Board in the course of the investiga-

tion which resulted in the certification of the C. I. O. failed to satisfy the due process clause of the Constitution and hence urge that the case involves a constitutional question judicial review of which is required in this proceeding. The facts alleged in the complaint, however, clearly establish that the procedure followed by the Board satisfies due process requirements.

As noted in the Statement, petitioners were heard with respect to their contention that all five of Potlatch's logging and milling operations should constitute a single appropriate bargaining unit at the hearing on the C. I. O. petitions for investigation and certification of representatives at each of three of Potlatch's five logging and milling operations (51 N. L. R. B., at 290–293). Thereafter the Board issued and served upon petitioners a notice to show cause why it should not reinstate the original C. I. O. petitions, treat the new C. I. O. petition as an amendment thereto, and proceed to a new decision upon the basis of its reconsideration of the petitions as thus amended without holding a further hearing (R. 5). Petitioners, in response thereto, objected generally to the Board's proposed procedure but failed to allege any facts establishing that they would be prejudiced by the Board's proposal to conduct the election among the employees in all five of Pot-

latch's operations, the unit which petitioners had previously contended was the appropriate unit, without holding a further hearing (*id.*). The Board thereupon directed and held the election (R. 6, 9). Subsequently, petitioners filed with the Board a motion to vacate and to grant a hearing, this time alleging facts tending to establish prejudice to its rights resulting from the Board's failure to hold a further hearing before conducting the election (R. 7–9). Pursuant to petitioners' motion, the Board directed that a further hearing be held "to adduce evidence with respect to the issues raised by the last said motion and objections to the election" and agreed to reconsider the entire case (R. 9). The second hearing was held and petitioners fully participated therein (R. 10). Thereafter, upon reconsidering the entire case, including the evidence adduced at the second hearing, the Board handed down its supplemental decision and certification of representatives in which it affirmed its prior decision with respect to the scope of the unit appropriate for bargaining collectively with Potlatch and certified the C. I. O. as the exclusive representative of the employees in said unit (*id.*). On these facts there can be no question but that the Board's procedure fully satisfied constitutional requirements.

It is well settled that the due process clause of the Fifth Amendment guarantees no particular form of procedure, but is concerned solely with

the protection of substantial rights. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 351. In giving petitioners an opportunity to show cause why the Board's proposed procedure should not be adopted, the Board was affording petitioners due process of law. The Board was not required to receive evidence in the absence of an offer by petitioners to show the respects in which they would be prejudiced by the action which the Board proposed to take. But assuming, *arguendo*, that the Board erred in failing to hold a further formal hearing prior to issuing its decision and direction of election, its failure in this regard does not present any constitutional question since the Board did subsequently hold a formal hearing prior to the issuance of its supplemental decision and certification of representatives at which petitioners were fully heard with respect to all issues which they desired to raise. This procedure fully satisfies the due process clause. The courts have repeatedly held not only that a hearing need not be held at any particular time, but that it may be held at any time before final judgment is entered (*Gallup* v. *Schmidt*, 183 U. S. 300, 307; *Wilson* v. *Standefer*, 184 U. S. 399, 415; *Wells, Fargo & Co.* v. *Nevada*, 2 . S. 165, 168; *United States* v. *Illinois Central R. Co.*, 291 U. S. 457, 463; *Nickey* v. *Mississippi*, 292 U. S. 393; *Opp Cotton Mills* v. *Administrator, Wage and Hour Division*, 312 U. S.

126, 152–153). Indeed, this Court has held that due process requirements are met even if no hearing is held before judgment is entered, if an opportunity to be heard is afforded on appeal (*York v. Texas*, 137 U. S. 15, 20–21; *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 168; *George Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 384).

2. Petitioners' further contention that the hearings held by the Board in the certification proceeding in question do not comply with the statutory requirement therefor and that hence the district court had jurisdiction to set aside the certification is without merit. It should first be noted that the provision in Section 9 (c) of the Act for an appropriate hearing in any investigation of a question concerning representation does not require that a hearing be held at any particular stage of the proceedings. Consequently, any hearing which satisfies the due process clause of the Constitution meets the statutory requirement. We have shown, under point one, that the two hearings held by the Board prior to the issuance of the certification in controversy fully satisfy constitutional requirements. The face of the complaint likewise reveals that the petitioners were afforded the hearing contemplated by the Act in the representation proceeding in question.

In any event, the district courts are powerless to intervene to set aside certifications of repre-

sentatives made pursuant to Section 9 (c) of the Act. In Section 9 of the Act, Congress vested in the Board the function of determining the unit appropriate for collective bargaining and of investigating and certifying the collective bargaining representatives selected in accordance with the Act (Sections 9 (b) and (c)). Congress, however, did not see fit to provide for judicial review of the Board's certifications of bargaining representatives except as prescribed in Section 9 (d) of the Act. That subsection provides for review of certification proceedings by the appropriate circuit court of appeals of the United States only after the Board enters a final order pursuant to Section 10 (c) of the Act, based in whole or in part upon facts certified following an investigation under Section 9 (c). When the Board enters such an order, any person aggrieved thereby may obtain a review under Section 10 (f) of the Act. The statute on its face thus discloses an intention on the part of Congress to prevent the review of certifications made pursuant to Section 9 (c) of the Act except where such certifications form the basis for a final order under Section 10 (c) of the Act, directing an employer to cease unfair labor practices. This Court has held, after carefully considering the legislative history of the Act, that it was the intention of Congress to deny to the circuit courts of appeals power to intervene in representation proceedings conducted by the

Board under Section 9 (c) of the Act, except in the limited manner provided in Section 9 (d). *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401; *National Labor Relations Board* v. *International Brotherhood of Electrical Workers*, 308 U. S. 413. As petitioners have noted (Br. 15), however, this Court found it unnecessary to reach the question with which we are here concerned: whether the district courts sitting in equity have the power to review such certifications of representatives.

The legislative history of the Act, it is submitted, compels the conclusion of the court below that Congress intended to leave the determination of the appropriate bargaining unit and the investigation and certification of the statutory bargaining representative of employees entirely to the Board and to exclude such determinations and certifications from judicial scrutiny except in the manner provided in the Act. Thus the Senate Committee Report on S. 1958, the bill which subsequently became the National Labor Relations Act (S. Rep. No. 573, 74th Cong., 1st Sess., p. 14) states that:

> Section 9 (d) makes it absolutely clear that there shall be no right to court review anterior to the holding of an election. An election is the mere determination of a preliminary fact, and in itself has no substantial effect upon the rights of either employers or employees. There is no more reason

> for court review prior to an election than for court review prior to a hearing. But if subsequently the Board makes an order predicated upon the election, such as an order to bargain collectively with elected representatives, then the entire election procedure becomes part of the record upon which the order of the Board is based, and is fully reviewable by any aggrieved party in the Federal courts in the manner provided in section 10. And this review would include within its scope the action of the Board in determining the appropriate unit for purposes of the election. This provides a complete guarantee against arbitrary action by the Board.

As this Court noted in the *American Federation of Labor* case, *supra*, (308 U. S., at 411), "the bill was similarly explained on the Senate floor by the committee chairman who declared: 'It provides for review in the courts only after the election has been held and the Board has ordered the employer to do something predicated upon the results of an election' (79 Cong. Rec., 7658)."

The House Committee (H. Rep. No. 1147, 74th Cong., 1st Sess., p. 23) said:

> Section 9 (d) of the bill makes clear that there is to be no court review prior to the holding of the election, and provides an exclusive, complete, and adequate remedy whenever an order of the Board made pursuant to section 10 (c) is based in whole or

in part upon facts certified following an election or other investigation pursuant to section 9 (c).

The reasons for withholding from the courts the power to review certifications of bargaining representatives made pursuant to Section 9 (c) of the Act, except as incidental to review by the circuit courts of appeals of an order restraining unfair labor practices under Section 10 (c) of the Act, are clearly stated in the Committee Reports which refer to the experience of the predecessor National Labor Relations Board under Public Resolution 44, (48 Stat. 1183), wherein Congress specifically provided for court review of orders for elections. Thus the Senate Report (S. Rep. No. 573, 74th Cong., 1st Sess., pp. 5–6) reads as follows:

> Under Public Resolution 44, any attempt by the Government to conduct an election of representatives may be contested *ab initio* in the courts, although such election is in reality merely a preliminary determination of fact. This means that the Government can be delayed indefinitely before it takes the first step toward industrial peace. After almost a year not a single case, in which a company has chosen to contest an election order of the Board, has reached decision in any circuit court of appeals.
>
> This break-down of the law is breeding the very evil which the law was designed to prevent.

The House Committee, after referring to the procedure for review under Public Resolution 44, similarly declared (H. Rep. No. 1147, 74th Cong., 1st Sess., p. 7):

> When an employee organization has built up its membership to a point where it is entitled to be recognized as the representative of the employees for collective bargaining, and the employer refuses to accord such recognition, the union, unless an election can promptly be held to determine the choice of representation, runs the risk of impairment of strength by attrition and delay while the case is dragging on through the courts, or else is forced to call a strike to achieve recognition by its own economic power. Such strikes have been called when election orders of the National Labor Relations Board have been held up by court review.

The conclusion that Congress intended in the Act to limit judicial review of actions of the Board in representation proceedings to that provided in Section 9 (d) of the Act is strongly reinforced by the decision of this Court in *Switchmen's Union of North America* v. *National Mediation Board*, 320 U. S. 297, under the Railway Labor Act. There is no provision in the Railway Labor Act for judicial review of certifications of representatives made pursuant to Section 2, Ninth, but that Act does provide for judicial review of two other types of administrative actions (Sec-

tions 3, First (p) and 9, Third (a)). This Court (320 U. S., at 301, 305), by reference to "the type of problem involved and the history of the statute in question", and the "highly selective manner in which Congress has provided for judicial review of administrative orders or determinations under the Act", concluded that Congress did not intend to allow judicial review of determinations of the National Mediation Board under Section 2, Ninth, of that Act. The Court accordingly reversed the decision of the Court of Appeals for the District of Columbia, expressly holding (320 U. S., at 300) that "the District Court did not have the power to review the action of the National Mediation Board in issuing the certificate." See also *General Committee of Adjustment* v. *Missouri-Kansas-Texas Railroad Co.*, 320 U. S. 323; *General Committee of Adjustment* v. *Southern Pacific Co.*, 320 U. S. 338; *Brotherhood of Railway & Steamship Clerks* v. *United Transport Service Employees*, 320 U. S. 715; *Order of Railway Conductors* v. *National Mediation Board*, 141 F. (2d) 366, 367 (App. D. C.), certiorari granted, No. 200, this Term, October 9, 1944; *United Transport Service Employees* v. *National Mediation Board*, 141 F. (2d) 724, 725 (App. D. C.); *National Federation of Railway Workers* v. *National Mediation Board*, 141 F. (2d) 725, 726 (App. D. C.); cf. *Employers Group of Motor Freight Carriers* v. *National War*

Labor Board, 143 F. (2d) 145 (App. D. C.), certiorari denied, October 9, 1944.

We submit that the factors which impelled this Court to hold in the *Switchmen's* case that Congress in the Railway Labor Act intended to vest in the National Mediation Board "the final say" (320 U. S., at 303) with respect to disputes concerning the representation of employees, without affording recourse to the courts, plainly require a similar conclusion under the National Labor Relations Act. The problem involved, that of determining the collective bargaining representative, is the same under both Acts, and it is as important under the National Labor Relations Act as it is under the Railway Labor Act that there "be no dragging out of the controversy into other tribunals of law" (320 U. S., at 305). The legislative history of the National Labor Relations Act, as we have shown, establishes even more clearly than does the legislative history of the Railway Labor Act, the intention of Congress to limit judicial review of representation proceedings under Section 9 (c) of the Act to that afforded in the circuit courts of appeals in connection with the review of orders in unfair labor practice proceedings based in whole or in part on certifications issued by the Board in prior representation proceedings. The court below, therefore, properly regarded the *Switchmen's* case as foreclosing the contention, here urged by petitioners, that the district courts

had jurisdiction to set aside certifications of representatives under Section 9 (c) of the Act. Its conclusion is no less correct when the petitioners' claim is that the hearings afforded did not meet the statutory standards, than it is, constitutional questions aside, when any other type of challenge to the certification order is made.

The wisdom of the congressional policy to deny the courts jurisdiction over certification proceedings except as provided in Section 9 (d) of the Act is more evident now than ever before, for, in this way, the industrial strife which Congress has found results from attempts to delay by court action the determination of bargaining representatives by the Board (S. Rep. No. 573, 74th Cong., 1st Sess., pp. 5-6; H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 6-7) is avoided as far as is possible. During the fiscal year ending June 30, 1944, the Board held over 4,700 elections and pay roll checks in which almost 1,100,000 valid votes were cast.[1] In the previous fiscal year, the Board conducted about 4,150 elections and pay roll checks in which an even greater number of valid votes were cast.[2] In the fiscal years ending in

[1] Of this total number, 501 were pay roll checks. These figures are taken from tables prepared for inclusion in the Board's *Ninth Annual Report* which is not yet published.

[2] National Labor Relations Board, *Eighth Annual Report*, 1943, pp. 23, 24, 95. The Board's records show that 511 of this total were pay roll checks.

1942, 1941, and 1940, the Board held 4,212, 2,566, and 1,192 elections and pay roll checks.[3] It can thus be readily seen that if the determination of bargaining representatives by the Board is delayed by resort to the courts in only a small percentage of the election cases handled by the Board, industrial strife which Congress sought to avoid would result.

In view of the limitations upon court review of certification proceedings appearing on the face of the Act, the manifest intention of Congress that there be no other type of court review of such proceedings, and the clear authority of Congress to limit review to that provided in the Act, it is respectfully submitted that the court below properly concluded that the statutory review of certification proceedings is exclusive and that the district courts, accordingly, are without jurisdiction over such proceedings.

CONCLUSION

The decision of the court below is correct and there is no conflict of decisions. The case involves no constitutional question and no other question is presented which warrants review. The petition

[3] National Labor Relations Board, *Seventh Annual Report*, 1942, pp. 32, 34; *Sixth Annual Report*, 1941, p. 36; *Fifth Annual Report*, 1940, p. 18.

for a writ of certiorari should therefore be denied.

Respectfully submitted.

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NOVEMBER 1944.

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CITATIONS

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Cases Continued. Page

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 613

INLAND EMPIRE DISTRICT COUNCIL, LUMBER AND SAW MILL WORKERS UNION, LEWISTON, IDAHO, ET AL., PETITIONERS

v.

HARRY A. MILLIS, INDIVIDUALLY AND AS CHAIRMAN AND MEMBER OF THE NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R. 15–16) is unreported. The opinions in the United States Court of Appeals for the District of Columbia (R. 20–24) are reported in 144 F. (2d) 539. The supplemental decision and certification of representatives issued by the National Labor Relations Board is reported in 55 N. L. R. B. 255. Deci-

sions of the Board in earlier phases of this case are reported in 51 N. L. R. B. 288 and 52 N. L. R. B. 1377 (Appendix A, pp. 65–102, *infra*).[1]

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia (R. 24) was entered on July 24, 1944. The petition for a writ of certiorari was filed on October 19, 1944 and was granted on December 4, 1944 (R. 26). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the district courts of the United States have jurisdiction to set aside a certification, issued by the National Labor Relations Board under Section 9 (c) of the National Labor Relations Act, that a particular labor organization is the collective bargaining representative of the employees in a designated unit, upon allegations by a rival labor organization that the hearings conducted by the Board in the course of its investigation of the question concerning representation did not constitute the hearings contemplated by Section 9 (c) of the Act.

2. A further question argued by petitioners, but which we think is not presented in this case,

[1] For the convenience of the Court, copies of the Board's decisions and certification have been printed as Appendix A to this brief (pp. 65–102, *infra*).

is whether the district courts of the United States have jurisdiction to set aside such a certification of representatives, upon allegations by the rival organization showing that the hearings conducted by the Board were inadequate under the due process clause of the Fifth Amendment of the Constitution.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151, *et seq.*) are set forth in Appendix B to this brief, pp. 103–107, *infra*.

STATEMENT

On March 9, 1943, certain local unions of International Woodworkers of America, affiliated with the Congress of Industrial Organizations, herein collectively called the C. I. O., filed petitions requesting the National Labor Relations Board to certify them as the collective bargaining representatives of the employees at the Clearwater Unit Plant, the Clearwater Logging Department, and the Bovill Logging Department, respectively, of Potlatch Forests, Inc., hereinafter called the Company (R. 3–4; 51 N. L. R. B. 288, 289–290, pp. 65–66, 68, *infra*).[2] The plants in

[2] Upon the Board's motion to dismiss, the facts appearing from the Board's decisions which serve to amplify and clarify the allegations in the complaint may be judicially noticed. *Fletcher* v. *Jones*, 105 F. (2d) 58, 61–62 (App. D. C.), and cases there cited; *Phillips* v. *Grand Trunk Western Ry. Co.*, 195 Fed. 12, 16 (C. C. A. 6), affirmed, 236 U. S. 662, 664; IX Wigmore, *Evidence*, sec. 2579. See also Section 3 (b) of the Act, Appendix B, p. 103, *infra*.

question are three of five logging and milling operations in Idaho which the Company, a Maine corporation, conducts in connection with its general lumber manufacturing business, the other two plants being its Potlatch Unit plant and its Rutledge Unit plant (R. 3; 51 N. L. R. B. 288, 289, p. 67, *infra*).

The Board consolidated the cases arising upon the C. I. O. petitions and provided for an appropriate hearing, which was held on May 14 and 15, 1943, before a trial examiner in Lewiston, Idaho. The C. I. O., the Company, and petitioners, hereinafter called the A. F. of L.,[3] appeared, were represented by counsel, and participated in the hearing (R. 4; 51 N. L. R. B. 288, 289, p. 66, *infra*). The A. F. of L. contended at the hearing that the production and maintenance employees at all five operations or plants of the Company constituted the appropriate unit and it moved to dismiss the C. I. O. petitions on the ground that

[3] Petitioners are five locals of the Lumber and Sawmill Workers Union, chartered by the United Brotherhood of Carpenters and Joiners of America, affiliated with the American Federation of Labor; Inland Empire District Council, Lumber and Sawmill Workers Union, whose membership comprises the five locals; and Harry Haines, president of the Inland Empire District Council (R. 1-2). The A. F. of L. appeared in the hearing referred to in the text as the five locals, affiliated with the Northwestern Council Lumber and Sawmill Workers (51 N. L. R. B. 288, 289-290, pp. 66-68, *infra*). Unless otherwise indicated, the term A. F. of L. will be used without making specific reference to whether or not all petitioners are thereby intended.

the separate units consisting of each of three of the operations were inappropriate (R. 4; 51 N. L. R. B. 288, 289, 290, pp. 66, 68, *infra*). On July 13, 1943, the Board, upon the entire record made at the hearing and after considering a brief and a supplemental brief which the A. F. of L. submitted, rendered its Decision and Order (R. 4; 51 N. L. R. B. 288, pp. 65–73, *infra*).

The Board found, in substance, that by 1941 the A. F. of L. had successfully organized and been selected as bargaining representative of the employees of all five of the Company's operations; that on June 5, 1941, the Company and the five locals of the A. F. of L. executed a "master contract" recognizing the A. F. of L. as the exclusive representative of the production and maintenance employees at all five operations and establishing "basic conditions and general principles" upon a company-wide basis; that this contract had been renewed and was still in effect; and that supplementary local contracts had been entered into between the separate locals and the Company covering purely local affairs in each of the separate operations (R. 4; 51 N. L. R. B. 288, 291–292, pp. 70–72, *infra*). The Board concluded that the history of collective bargaining between the Company and the A. F. of L. "clearly indicates the propriety of a unit consisting of the logging and mill employees of the Company"; that "the bargaining on matters of wages, hours, and

general working conditions has been conducted by the A. F. of L. for all the production and maintenance employees of the Company"; and that "units consisting solely of the employees of the three operations of the Company which the C. I. O. seeks to represent are inappropriate" (R. 4; 51 N. L. R. B. 288, 292, pp. 72, 73, *infra*). Accordingly, it granted the motion of the A. F. of L. to dismiss the C. I. O. petitions (R. 4; 51 N. L. R. B. 288, 289, 293, pp. 67, 73, *infra*).[4]

Three days later, on July 16, 1943, the C. I. O. filed with the Board a further petition requesting that it be certified as the exclusive bargaining representative in a single unit composed of the production and maintenance employees of the Company at all five of its operations, excluding clerical, supervisory, confidential, and temporary employees, as well as employees of Potlatch Townsite and of Potlatch Mercantile Company (R. 4; 52 N. L. R. B. 1377, 1381, pp. 75, 81–82, *infra*). This unit conformed generally to the unit covered by the contract of June 5, 1941, between the Company and the A. F. of L., as amended by the local agreements covering each of the Company's op-

[4] The Board found it unnecessary, in view of its agreement with the A. F. of L.'s objections to the unit, to decide whether the contracts between the A. F. of L. and the Company constituted a bar to a determination of representatives (51 N. L. R. B. 288, 290, note 2; p. 68, *infra*). It is the Board's practice generally to hold that established bargaining relations should remain undisturbed for a reasonable period, usually one year. National Labor Relations Board, *Eighth Annual Report* (Gov't Print. Off., 1943), pp. 45–49.

erations (52 N. L. R. B. 1377, 1381, p. 81, note 11, *infra*).[5]

On September 14, 1943, the Board, upon motion of the C. I. O., issued and served upon the A. F. of L. a notice to show cause why (1) the decision and order in the case arising upon the prior petitions of the C. I. O., which had been dismissed, should not be vacated; (2) the petitions in those cases should not be reinstated; (3) the new petition, requesting a single-company-wide unit should not be made a part of the record in the earlier cases and treated as an amendment to the petitions in those cases; (4) the statement of the Board's field examiner concerning C. I. O. claims of authorization for the purpose of representation in the subsequent case should not be made part of the record in the earlier cases;[6] and (5) the Board

[5] The Board so found, and the A. F. of L.'s complaint contains no allegation to the contrary. See, also, pp. 9–10, *infra*.

[6] This has reference to the Board's practice of having its field examiners check union authorization cards in each case before proceedings are conducted, in order to satisfy the Board as a preliminary matter that the organization has sufficient interest to warrant the Board's proceeding. See National Labor Relations Board, *Eighth Annual Report* (Gov't Print. Off., 1943), p. 44. If hearing is thereafter had, the examiner is required to introduce into evidence at the hearing a statement showing the results of the card check. The practice was first adopted in 1940 and has been uniformly followed. The Board has frequently explained in its decisions the *ex parte* nature of the investigation and that its purpose is not to determine the actual representation of the labor organization, but is merely a safeguard against indiscriminate institution of proceedings by labor organizations which might, in fact, have no substantial membership among the employees. See pp. 10–11, *infra*.

should not reconsider and proceed to a new decision and order in the earlier cases as thus supplemented, without holding a further hearing in those cases (R. 4–5; 52 N. L. R. B. 1377, 1378, pp. 75–76, *infra*). In response to said notice, the A. F. of L. filed its "Protest and Objection," alleging in substance that (a) the Board's proposed order contemplated a decision by the Board without the taking of evidence, which would be based partially upon a report and investigation of the Board's field examiner concerning C. I. O. claims of authorization for the purpose of representation which was hearsay and *ex parte* as to the A. F. of L., since the A. F. of L. was deprived of an opportunity to cross-examine with respect thereto; (b) the employees at the Potlatch Unit plant and the Rutledge Unit plant would be deprived of an opportunity to demonstrate their bargaining status, inasmuch as they had no opportunity at the former hearing, nor at any time since, to present evidence on their own behalf; and (c) the Board had no authority to set aside an existing contract by such proceedings (R. 5; 52 N. L. R. B. 1377, 1378, p. 76, *infra*).

On October 14, 1943, the Board issued its decision (R. 6; 52 N. L. R. B. 1377, pp. 74–86, *infra*). As appears from the face of the decision, the Board considered the A. F. of L.'s objections and protests on the return of the notice to show cause, but it found that these were "insufficient"

(*id.* at p. 1378, p. 77, *infra*). As to the A. F. of L.'s objection based upon the allegation that the employees at the Potlatch Unit plant and the Rutledge Unit plant were deprived of an opportunity to establish their bargaining status, the Board pointed out that at the hearing in the original cases the C. I. O. sought three separate units consisting of the production and maintenance employees at the Clearwater Unit plant, the Bovill Logging department, and the Clearwater Logging department, and that the A. F. of L. contended in opposition that all production and maintenance employees at the five operations of the Company constituted the appropriate unit, "basing its contention upon the history of industrial relations of the Company which, since 1941, has bargained with respect to its employees upon the basis of a single company-wide unit." The Board pointed out, further, as has already been noted (pp. 6–7, *supra*), that the unit presently sought by the C. I. O. conforms generally to the A. F. of L.'s contract of June 5, 1941, as amended by the local agreements covering each operation, and that the A. F. of L. had theretofore "conceded no severability in the bargaining status of the employees comprising any one of the several operations now included within the bargaining unit which it currently represents." The Board declared that in these circumstances "any implication that the bargaining rights or status of the

employees at two of the operations is in any way different from that of the remaining employees in the unit would be diametrically opposed to the position that the A. F. of L. has constantly maintained herein, and which is evidenced by its bargaining relations with the Company since 1941." The Board noted that all five of the locals had appeared and participated by counsel in the earlier hearing. In view of all these facts, it concluded that the A. F. of L.'s objections to the proposed procedure on the score of alleged lack of opportunity to the employees at the Potlatch and Rutledge Unit plants to establish their bargaining status were untenable (*id.* at p. 1381, pp. 81–82, *infra*).

With respect to the A. F. of L.'s objection to inclusion of the field examiner's report as to C. I. O. authorizations on the ground that the statements contained therein were hearsay and, as to the A. F. of L., *ex parte* and not subject to cross examination, the Board pointed out that such statements are based upon Board investigations which are necessarily *ex parte*, that the statements are not offered as final proof of representation but are merely safeguards against the indiscriminate institution of representation proceedings by labor organizations which might in fact have no substantial membership among the employees in the unit claimed to be appropriate, and that the showing of substantial representation

is, accordingly, an administrative requirement of the Board to satisfy it, as a preliminary matter, that it is justified in proceeding with the investigation. It concluded, therefore, that the A. F. of L.'s objection on this ground was likewise without merit (*id.* at p. 1380, note 10, pp. 80–81, *infra*).

The Board also examined fully into the contractual relations between the A. F. of L. and the Company, as shown by the record and the allegations of the A. F. of L., for the bearing, if any, which these agreements might have upon its proposed procedure (*id.* at pp. 1379–1380, pp. 78–80, *infra*).[7] The Board found that the master agreement of June 5, 1941, provided that it could be modified or terminated upon sixty days' written notice by either party, and that in the absence of such notice it was automatically terminated on June 1, 1942; that the contract had been subsequently renewed on May 29, 1942, such renewal expiring on June 1, 1943; and that by letters dated March 9 and 29, 1943, the C. I. O. had requested the Company to recognize it as the bargaining representative of the employees at the Clearwater Unit plant and the Bovill and Clearwater Logging departments (*id.* at p. 1380, pp. 78–79, *infra*). The Board stated that it had

[7] As has been stated above (note 4, p. 6), the Board previously had found it unnecessary to determine the effect, if any, of the contracts upon the proceedings, because the units sought by the C. I. O. were, in any event, inappropriate.

received notice that the A. F. of L. contract had once more been renewed, since the filing of the original petitions by the C. I. O. (*ibid.*, note 7, p. 79, *infra*), but it found that since the original notices of bargaining demands given by the C. I. O. were timely and because the contract of June 5, 1941, as subsequently renewed, was terminable at any time upon sixty days' notice, the agreement did not constitute a bar to the proceedings (*id.* at pp. 1377, 1380; pp. 79–80, *infra*).

Upon the basis of its conclusions that the A. F. of L.'s objections were without merit and upon the entire record made, the Board vacated its previous decision and order in the cases arising upon the earlier petitions of the C. I. O., reinstated those petitions, made the later C. I. O. petition a part of the record in the earlier cases, treating it as an amendment to those petitions, and made the statement and revised statement of the field examiner concerning claims of authorization for the purpose of representation part of the record in the earlier cases (R. 6; 52 N. L. R. B. 1377, 1378–1379, p. 77, *infra*). The Board thereupon reconsidered the earlier cases upon the entire record made at the earlier hearing as thus supplemented in the subsequent proceedings. It found that a question had arisen concerning the representation of employees of the Company within the meaning of the Act (*id.* at p. 1381, p. 81, *infra*), and that the bargaining history be-

tween the Company and the A. F. of L. clearly indicated that a unit comprised of all production and maintenance employees at the Company's five operations was appropriate (*id.* at p. 1382, pp. 82–83, *infra*).

The Board also considered and made findings in its decision with respect to the inclusion or exclusion from the appropriate unit, of certain "fringe" classifications of employees whose status, the Board stated, was in dispute at the hearing (*id.* at p. 1382, pp. 83–84, *infra*). As appears from the decision, these included the employees of a store which the Company operated in Bovill, Idaho, whom the A. F. of L. contended should be included and the C. I. O. contended should be excluded; scalers employed at the Clearwater Logging department, whom both organizations desired included; and militarized and deputized guards and watchmen, whom both organizations likewise desired included. As to the store employees, the Board pointed out that the A. F. of L. based its contention for their inclusion upon the alleged facts that they were included within the scope of the local contract covering the Bovill Logging department and that it had bargained with the Company on their behalf, but the Board found that in point of fact the local contract was silent on the matter, and, further, that in any event the interests of the store employees were not akin to those of the production and maintenance

employees. The Board therefore excluded them from the unit. The Board found, also, that the interests and duties of the scalers were sufficiently allied to those of the logging employees to warrant their inclusion in the unit and therefore included them, as the A. F. of L. and C. I. O. had requested. It excluded the militarized and deputized guards and watchmen, in accordance with its usual policy, citing in that connection its decision in *Matter of Dravo Corporation,* 52 N. L. R. B. 322, in which it had fully considered and announced the basis for that policy. The Board decided, further, that the unit should exclude all supervisory employees, clerical employees, confidential employees, and temporary employees, these groups of employees falling into classifications which the Board normally excludes from production and maintenance units. In addition, it excluded several groups of other working men, i. e., employees of Potlatch Mercantile Company, employees of the Townsite Department, and foresters, who were excluded from the units in the local contracts which the A. F. of L. had with the separate operations of the Company (52 N. L. R. B. 1377, 1382–1383, and notes 16, 17 and 18, pp. 83–84, *infra*). Finally the Board excluded employees of the Washington-Idaho-Montana Railroad (*id.* at p. 1382, p. 84, *infra*), which the Board found to be a subsidiary common carrier corporation owned and operated by the Company (*id.* at p. 1379, p. 77, *infra*).

The Board directed that an election be conducted among the employees in the appropriate unit to determine whether they desired to be represented by the A. F. of L., the C. I. O., or neither (*id.* at p. 1383, pp. 85–86, *infra*). In accordance with its usual practice, the Board decided that those eligible to vote should include all employees in the unit who were employed during the pay-roll period immediately preceding the date of the direction, including ill, vacationing, or temporarily laid-off employees and those in the armed forces of the United States who presented themselves in person at the polls, but excluded employees who had since quit or been discharged for cause (*id.* at p. 1383, p. 86, *infra*).

On November 9, 10, 11, and 12, 1943, the Board conducted an election among the employees in the appropriate unit under the direction of the regional director (R. 8–9). The C. I. O. received 1,118 votes and the A. F. of L. received 953 votes (R. 9).[8]

On November 17, 1943, the A. F. of L. filed "Objections and Exceptions to Election" (R. 9; 55 N. L. R. B. 255, 256, p. 88, *infra*). These are described in the Board's Supplemental Decision and Certification of Representatives (55

[8] There were 2,886 eligible voters in the unit, of whom 2,178 cast ballots. Of these, 83 were challenged, 3 were void, and 21 were for neither labor organization. The 83 challenges were never resolved because these ballots could not affect the results of the election (R. 9; 55 N. L. R. B. 255, p. 88, *infra*).

N. L. R. B. 255, 256, pp. 88–89, *infra*), as alleging that—[9]

> (1) the order directing the election was invalid, since no hearing was afforded by the Board, as required by statute, and since the evidence considered by the Board in ordering the election was, as to the A. F. L., hearsay and *ex parte*; (2) a substantial number of employees of * * * the Company, who are now in military service, were erroneously excluded from participating in the election because of the method of conducting said election; (3) the order directing the election excluded railway maintenance employees who are members of the Potlatch local of the A. F. L., a party to the Master Contract between the Company and the A. F. L.; (4) Townsite employees were improperly excluded from participating in the election; and (5) a number of votes were cast by employees added to the Company's pay roll subsequent to the Direction of Election.[10]

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[9] The complaint alleges merely that "* * * the plaintiff unions * * * filed objection to the election * * *" (R. 9). It contains no allegations contrary to the statements in the Board's Supplemental Decision and Certification of Representatives, quoted in the text.

[10] These objections were filed with the regional director who, under the Board's practice, on December 28, 1943, issued a report on the objections, which was served on all the parties and referred to the Board. In the report, the director recommended that, since the objections related to matters involving the propriety of the Board's Decision and Direc-

Thereafter, on January 11, 1944, the A. F. of L. also filed with the Board a motion to reconsider and vacate the Decision and Direction of Election, to vacate the election, to stay certification of representatives, and to grant an appropriate hearing (R. 9). As appears from the statement of the proceedings in the Board's Supplemental Decision and Certification of Representatives (55 N. L. R. B. 255, 256, pp. 89-90, *infra*), the A. F. of L. contended, in general, in support of its motion, that—[11]

> (1) the Decision and Direction of Election was issued without according the A. F. L. a hearing in accordance with its statutory rights in that it was not afforded an opportunity to present evidence with respect to issues not present in the original proceeding, referring specifically to Potlatch Mercantile and Potlatch Townsite employees, and other employees engaged in and about the two operations not involved in that proceeding; (2) no opportunity was accorded the A. F. L. to present evidence with respect to the appropriate pay roll to be used for determination of eligibility, or with respect to the proper times and places for the holding of the election; and (3) the A. F. L. was not given an adequate opportunity to present evidence with respect

tion of Election and did not relate to the conduct of the ballot, the objections should be overruled (55 N. L. R. B. 255, 256, p. 89, *infra*).

[11] The complaint contains no contrary allegations.

> to (a) the status of Washington-Idaho-Montana railroad employees, (b) the validity of the statement of the Field Examiner * * * which was considered as part of the record in the Decision and Direction of Election, (c) the status of employees of the Potlatch and Rutledge operations who had entered the armed services of the United States, (d) the impropriety of permitting the participation in the election of employees added to the Company's pay roll between the date of the hearing and the dates of the election, and (e) the nature and status of the contractual relations between the Company and the A. F. L.

On January 27, 1944, the Board issued its order, directing that a hearing be held on the matters raised in the A. F. of L.'s objections to the election and its motion, remanding the case to the regional director for that purpose, and deferring ruling upon the A. F. of L.'s request that the Decision and Direction of Election and the election be vacated, until after the Board had reconsidered the entire record, including the evidence to be adduced at the further hearing (R. 9; 55 N. L. R. B. 255, 257, pp. 90–91, *infra*). On February 18 and 19, 1944, a hearing was held pursuant to the aforesaid order, before a trial examiner of the Board (R. 10). The A. F. of L., the C. I. O., and the Company appeared and participated fully (R. 10; 55 N. L. R. B. 255, 257,

p. 91, *infra*). Following this hearing, the Board, on March 4, 1944, issued its Supplemental Decision and Certification of Representatives (R. 10; 55 N. L. R. B. 255, pp. 87–102, *infra*).

In the Supplemental Decision, the Board made supplemental findings of fact which were based upon the entire record in the case, expressly including the election report, the A. F. of L.'s objections and exceptions, its motion for reconsideration, and the evidence taken at the hearing on the motion and objections (55 N. L. R. B. 253, 257, p. 91, *infra*). The Board first reviewed the entire proceedings had in the case and concluded that the requirements of an appropriate hearing had been met (*id.* at pp. 257–259, pp. 91–95, *infra*).[12] It therefore overruled the A. F. of L.'s contention that it had not been accorded a hearing (*id.* at p. 259, p. 95, *infra*). It then turned to a discussion of the A. F. of L.'s other contentions in support of its motion and objections to the election. With respect to the A. F. of L.'s contentions based upon its contractual relations with the Company, the Board found that the mas-

[12] There is no allegation in the complaint that the A. F. of L. was not given full opportunity at the further hearing to adduce evidence as to all of the matters covered by its motion and objections to the election. The complaint merely alleges that "The denial of a fair and appropriate hearing" before the election "was not and could not be cured by the granting and holding of a hearing on February 18 and 19, 1944, which was more than three months after the holding of the election" (R. 8).

ter contract of June 5, 1941, as renewed, had been terminated on May 1, 1943, pursuant to notice issued by the Company in accordance with the sixty-day cancellation clause contained in the agreement, and that the National War Labor Board had thereafter issued certain orders in proceedings before it, directing an extension of the contract but only "until a new exclusive bargaining agency is certified by the National Labor Relations Board" (55 N. L. R. B. 255, 259–260, pp. 95–96, *infra*; see also R. 10–11).

With respect to the A. F. of L.'s contentions that it was entitled to introduce evidence relating to the right of employees in the armed forces to vote, to the appropriate pay roll for determining eligibility to vote, to the times and places for the conduct of the election, and to the inappropriateness of permitting persons to vote who were added to the pay roll between the date of the hearing in the original case and the date of the election, the Board, after pointing out that the A. F. of L. had been permitted at the further hearing to adduce such evidence, found that the evidence adduced[13] did not warrant departure, as desired by the A. F. of L., from its customary practice of not voting employees in the armed forces by mail ballots, or warrant a disturbance of its customary findings

[13] It should be noted that the A. F. of L. had also had full opportunity at the first hearing to state its position as to these matters and to adduce supporting evidence (see discussion at pp. 59–60, *infra*).

as to eligibility, made in its Decision and Direction of Election (55 N. L. R. B. 255, 260–261, pp. 97–98, *infra*). With respect to the status of employees of the Washington-Idaho-Montana Railroad, the Board found, on the basis of the evidence adduced at the further hearing, that although the railroad was a wholly owned subsidiary of the Company, it was a separate and distinct corporate enterprise, that the railroad's employees were not employees of the Company, and that they were covered by a contract between one of the A. F. of L. locals and the railroad as a separate unit (55 N. L. R. B. 255, 261, pp. 98–99, *infra*).[14]

The Board found, with respect to the Potlatch Townsite and Potlatch Mercantile employees, upon the basis of the evidence adduced at the further hearing, that the former are maintenance workers, concerned primarily with the repair and maintenance of property within the town of Potlatch, that their working schedule differs from that of the logging and mill employees, and that only rarely are they required to perform maintenance work at the Potlatch Unit plant, there being a separate maintenance crew attached to the plant for that purpose; it found that the Potlatch Mercantile employees work for, and are paid on

[14] The Board found it unnecessary to pass upon the question whether the railroad was subject to the Railway Labor Act and hence not an employer under Section 2 (2) of the National Labor Relations Act (55 N. L. R. B. 255, 261, note 19, p. 99, *infra*).

a salary basis by, the Potlatch Mercantile Company, and that their duties are confined to the store which that company operates (55 N. L. R. B. 255, 261–262, pp. 99–100, *infra*). The Board also found that both these groups of employees were specifically excluded from the units covered by the local contracts between the Company and the A. F. of L. (*id.* at p. 262, pp. 99–100, *infra*). It therefore concluded that there was no reason for disturbing its findings as to the exclusions of the above groups of employees from the appropriate unit (*ibid.*). In addition to the foregoing, the Board reconsidered the A. F. of L.'s claim that it was entitled to an opportunity to point out defects and weaknesses in the field examiner's statements as to C. I. O. authorization cards, and found that for reasons already stated in the Decision and Direction of Election this contention was without merit (55 N. L. R. B. 255, 261, p. 98, *infra;* see pp. 10–11, *supra*). Finally, the Board pointed out that although the issue was not specifically raised in either its motion or objections, the A. F. of L. presented evidence at the further hearing which showed that the militarized watchmen and guards employed by the Company had been demilitarized since January 10, 1944, and that the evidence showed further that watchmen, at least, are still deputized by the county. The Board considered the impact of this evidence upon its previous unit finding and determined that these facts presented no reason for disturbing its exclusion of deputized

as well as militarized guards and watchmen from the appropriate unit (55 N. L. R. B. 255, 262, p. 100, *infra*).

Upon the basis of all of the foregoing and the entire record, the Board concluded that the objections of the A. F. of L. to the election should be overruled, and that no reason was presented for disturbing its previous Decision and Direction of Election. It accordingly denied the A. F. of L.'s motion to vacate the Decision and Direction of Election, and the election, and it certified the C. I. O. as the exclusive representative of the employees in the appropriate unit (R. 10). On March 8, 1944, the A. F. of L. filed a motion for reconsideration of the Board's supplemental decision and certification, which the Board denied (R. 10).

On March 21, 1944, the A. F. of L. filed a complaint in the United States District Court for the District of Columbia, against the members of the Board individually and in their official capacities, praying for a mandatory injunction requiring them to set aside the Board's certification of representatives, dated March 4, 1944, and, in the alternative, for a declaratory judgment that the certification was void (R. 1–12). The complaint alleged in substance that the hearings held in the course of the proceedings culminating in the certification satisfied neither the due process clause of the Constitution nor the statutory requirement of a hearing contained in Section 9 (c)

of the National Labor Relations Act, and that the certification accordingly unlawfully deprived the A. F. of L. of valuable bargaining rights. On March 29, 1944, the members of the Board filed their motion to dismiss the complaint on the grounds that the district court was without jurisdiction of the subject matter of the complaint, and alternatively, that the complaint on its face failed to state a cause of action entitling petitioners to the relief requested (R. 13–15). On April 5, 1944, the district court denied the Board's motion (R. 16–17).

Thereafter, the Board, pursuant to Section 17–101 of the District of Columbia Code, filed its petition in the court below for the allowance of a special appeal from the order of the district court. On May 15, 1944, the court below entered its order allowing the special appeal (R. 18), and on July 24, 1944, upon consideration of the appeal, reversed the order of the district court and remanded the cause to that court with directions to dismiss the complaint (R. 20–21, 24). One judge dissented (R. 21–24).

SUMMARY OF ARGUMENT

I

Congress did not intend to permit review by district courts of Board certifications of labor organizations as the bargaining representatives of employees under Section 9 of the Act. This

is shown, first, by the scheme of the statute. The single situation in which court review of representation proceedings under Section 9 is referred to in the Act is that described in Section 9 (d), which provides for review by the circuit courts of appeals of certification proceedings after the Board has entered an order under Section 10 (c) based in whole or in part upon facts certified following an investigation pursuant to Section 9 (c).

The legislative history also shows that Congress intended to preclude review of certification proceedings except in the single situation already described (S. Rep. No. 573, 74th Cong., 1st Sess., pp. 5–6, 14; H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 6–7, 23; 79 Cong. Rec. 7658). There is no warrant for saying that the review provisions of the Act were intended to be exclusive only when employers seek review and not when labor organizations do so.

The correctness of the view that Congress did not intend district courts to have jurisdiction to review representation proceedings under the Act is reinforced by this Court's decision in *Switchmen's Union of North America* v. *National Mediation Board*, 320 U. S. 297, arising under the Railway Labor Act. Constitutional questions aside, there is no basis for a distinction, such as the A. F. of L. apparently seeks to make, based upon the nature of the respects in which the certification is

claimed to be defective. Whether, as in the instant case, the claim is that the hearing granted is inadequate, or whether, as in the *Switchmen's* case, it is that the unit is inappropriate, or whether the challenge is to some other failure to comply with the statute, the same considerations apply.

The foregoing interpretation of the Act raises no substantial question as to its constitutionality. It is well settled that due process of law does not necessarily require the exercise of the judicial power, particularly where, as in the case of the Board's certifications under Section 9 of the Act, an administrative hearing is provided. The decision in the *Switchmen's* case is authority for the view that no constitutional impediment exists to the power of Congress to deny judicial review of certifications.

II

The complaint fails on its face to raise any constitutional question, for it appears from the allegations, read in the light of the uncontroverted facts appearing in the Board's decisions, that the procedure followed by the Board that led up to the certification fully satisfied the due process requirements of the Fifth Amendment.

It is well settled that the due process clause guarantees no particular form of procedure, but requires only such hearing and notice as is commensurate with the necessities of the particular case and the character of the rights affected. It

was appropriate for the Board to proceed in the fashion it did in the particular circumstances of this case. The A. F. of L. made no showing, in response to the order to show cause, that further hearing before the election was necessary. Moreover, it is obvious, and the A. F. of L. makes no contrary claim, that before the Board made its final determination of the case, the A. F. of L. had full opportunity to present to the Board all relevant evidence bearing upon the controversy as to representation. Thus, the A. F. of L.'s due process allegations, at best, amount to no more than an assertion that although the hearings were commensurate with the necessities of the case and were fully adequate to permit it to make its contentions known and to support them by evidence and argument, they were nevertheless short of due process because held at one stage of the proceedings before final determination instead of at another. This Court has repeatedly held, however, that due process does not require that a hearing be held at any particular time.

ARGUMENT

I

CONGRESS DID NOT INTEND TO PERMIT REVIEW OF BOARD CERTIFICATONS BY DISTRICT COURTS

This Court held, in *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, 411, that Congress, making a deliberate choice of conflicting policies, intended that circuit

courts of appeals, granted reviewing powers under Section 10 of the National Labor Relations Act, should not have the power to review representation proceedings except as provided in Section 9 (d) in connection with review of orders in unfair labor practice cases in which the order under review is based, in whole or in part upon facts certified in the representation proceeding. The Court intimated no opinion upon, and expressly left open, the question whether the provisions of the Act were also intended by Congress to foreclose judicial review of Board certifications by independent suit in the district courts, and thus to deprive the district courts of some portion of their original jurisdiction conferred by Section 24 of the Judicial Code.[15] It is our con-

[15] There has been sharp disagreement among the lower federal courts on the question. See *Association of Petroleum Workers* v. *Millis et al.* (suit to enjoin holding of election), No. 20854 (N. D. Ohio), unreported, dismissed on July 9, 1941, on ground of lack of jurisdiction; *Sun Ship Employees Association, Inc.* v. *National Labor Relations Board et al.* (suit to review and set aside consent election), No. 3304 (E. D. Pa.), unreported, dismissed on August 4, 1943, for lack of jurisdiction, affirmed on other grounds, 139 F. (2d) 744 (C. C. A. 3); *International Brotherhood of Electrical Workers* v. *National Labor Relations Board* (suit to enjoin holding of election) No. 21994 (N. D. Ohio), unreported, dismissed on September 28, 1943, for lack of jurisdiction; *American Broach Employees Association* v. *National Labor Relations Board et al.* (suit to enjoin holding of election), No. 4242 (E. D. Mich.), unreported, dismissed on June 24, 1944, for lack of jurisdiction; *Spokane Aluminum Trades Council* v. *National Labor Relations Board* (suit to enjoin holding of election) No. 349 (E. D. Wash.), unreported, complaint dismissed on June 14, 1943, on ground that no case

tention that the review procedures of the Act are properly to be interpreted as exclusive.

A. *The statutory provisions.*—The single situation in which court review of representation proceedings under Section 9 is referred to in the Act

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was made out for equitable relief. Without ruling on jurisdiction, the court said that it did not think that the district court had jurisdiction; *International Brotherhood of Electrical Workers* v. *National Labor Relations Board et al.* (suit to enjoin holding of election), 41 F. Supp. 57 (E. D.) Mich.), court held it had jurisdiction. No appeal taken by Board because case became moot due to change in Board policy concerning run-off elections; *American Federation of Labor* v. *Madden et al.* (suit to review certification), 33 F. Supp. 943 (D. D. C.), court held it had jurisdiction. No appeal perfected because case became moot; *Klein* v. *Herrick* (suit to enjoin holding of election), 41 F. Supp. 417 (S. D. N. Y.), court held it had jurisdiction but dismissed complaint on ground suit was premature; *R. J. Reynolds Employees Association, Inc.* v. *National Labor Relations Board et al.* (suit to enjoin holding of election) (M. D. N. C.), unreported, court held on November 9, 1943, that it had jurisdiction and enjoined the Board from holding an election on two particular days, no appeal taken; *Reilly et al.* v. *Millis et al.* (suit to review certification), 52 F. Supp. 172 (D. D. C.), court held it had jurisdiction but dismissed case on other grounds, affirmed 144 F. (2d) 259 (App. D. C.) on still other grounds, petition for certiorari filed on January 29, 1945, No. 884, this Term; *The Brotherhood and Union of Transit Employees of Baltimore* v. *Madden* (suit to enjoin holding of election), 15 L. R. R. 519 (D. Md.), court held on November 27, 1944, that it had jurisdiction, reversed by Fourth Circuit Court of Appeals on January 29, 1945, 15 L. R. R. 806; *Inland Empire District Council Lumber & Sawmill Workers Union et al.* v. *Graham et al.* (suit to enjoin holding of election in instant case), 53 F. Supp. 369 (W. D. Wash.), dismissed on ground suit was premature. Court held it had jurisdiction.

is that described in Section 9 (d), which provides for review of certification proceedings by the circuit courts of appeals after the Board enters an order under Section 10 (c), based in whole or in part upon facts certified following an investigation pursuant to Section 9 (c). Thus, Section 9 (d) provides:

> Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Moreover, in the situations in which Congress did expressly provide for review of Board action in the Act, it carefully limited the review to review by the circuit courts of appeals (Sections 10 (f) and 9 (d)).[16]

[16] Under Section 10 (e), the Board may also seek enforcement of its orders in the district courts but only "if all the circuit courts of appeals to which application may be made are in vacation."

The fact that Congress thus made certifications judicially reviewable in a single situation and provided for their court review in no other case, and that it carefully limited review to the circuit courts of appeals, shows that Congress intended that no other review of them should be permitted. This is the natural construction of the Congressional action.[17] And it is hardly possible that Congress, which was so careful thus to limit such review of Board action, should have intended to permit general review of certification proceedings by the district courts.[18] Accordingly, we submit, the statute on its face discloses an intention on the part of Congress to prevent court review of certification proceedings except in the single instance described in the statute in which provision for such review is made. Cf. *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, 409.

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[17] See *Switchmen's Union of North America* v. *National Mediation Board*, 320 U. S. 297, 301, 305–306; *Arnson* v. *Murphy*, 109 U. S. 238; *Wilder Mfg Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, 174–175; *United States* v. *Babcock*, 250 U. S. 328, 331; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 404.

[18] See *Madden* v. *The Brotherhood and Union of Transit Employees of Baltimore*, decided January 29, 1945 (C. C. A. 4), 15 L. R. R. 806, 808, in which the court stated: "It is hardly posible that Congress should have intended to permit review by District Courts of 9 (c) proceedings while so carefully limiting review of such proceedings in the Circuit Courts of Appeals to cases in which an order under 10 (c) has been entered."

B. *The legislative history.*—The correctness of this view of the Congressional intention is shown by the legislative history. The reports of both the Senate and House Committees interpret Section 9 (d) as precluding review of certification proceedings except as there expressly provided. The Senate Committee Report (S. Rep. No. 573, 74th Cong., 1st Sess., p. 14), after noting the requirement of Section 9 (c) that in any such proceeding a hearing must be held, declares:

> Section 9 (d) makes it absolutely clear that there shall be no right to court review anterior to the holding of an election. An election is the mere determination of a preliminary fact, and in itself has no substantial effect upon the rights of either employers or employees. * * * But if subsequently the Board makes an order predicated upon the election, such as an order to bargain collectively with elected representatives, then the entire election procedure becomes part of the record upon which the order of the Board is based, and is fully reviewable by any aggrieved party in the Federal courts in the manner provided in section 10. And this review would include within its scope the action of the Board in determining the appropriate unit for purposes of the election. This provides a complete guarantee against arbitrary action by the Board.

The House Committee Report (H. Rep. No. 1147, 74th Cong., 1st Sess., p. 23), after pointing out

that the "efficacy" of Public Resolution 44[19] had been "substantially impaired by the provision for court review of election orders prior to the holding of an election," similarly states:

> Section 9 (d) of the bill makes clear that there is to be no court review prior to the holding of the election, and provides an exclusive, complete, and adequate remedy whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an election or other investigation pursuant to section 9 (c). The hearing required to be held in any such investigation provides an appropriate safeguard and opportunity to be heard.

The affirmative intent of Congress to preclude judicial review of certification proceedings, in the absence of any order against the employer based thereon, further appears from the remarks of Senator Walsh of the Senate Committee, in response to questions on the floor of the Senate (79 Cong. Rec. 7658), as follows:

> Mr. COUZENS. The Senator said that Resolution 44 was ineffective. Will he tell us before he concludes why Resolution 44 was ineffective?

[19] Public Resolution 44 (approved June 19, 1934, c. 677, 48 Stat. 1183), was, with Section 7 (a) of the National Industrial Recovery Act (Act of June 16, 1933, c. 90, 48 Stat. 195, 15 U. S. C. 701, *et seq.*), the immediate legislative predecessor of the National Labor Relations Act. See pp. 34–37, *infra*.

Mr. WALSH. It was ineffective, as I think I stated, because of appeals to the courts. In cases where attempts have been made to hold elections the claim has been made that the Board had no legal authority; the cases have been brought into court, and they are in the courts and undecided. * * *

Mr. COUZENS. Would the passage of the pending bill remove the appeals to the courts?

Mr. WALSH. Yes; it would because it limits appeals. It provides for review in the courts only after the election has been held and the Board has ordered the employer to do something predicated upon the results of the election.

The references to Public Resolution 44 (see note 19, p. 33, *supra*), indicate clearly the reasons for the desire of Congress to limit the review of representation investigations to cases in which they are the bases for unfair labor practice orders. Under Section 2 of that Resolution, the old National Labor Relations Board was empowered to hold elections, but "any order" issued under that authority was reviewable in the circuit courts of appeals. The manner in which this review operated in the single year of its life to nullify the election provisions is described at length in the reports of the committees recommending the passage of the National Labor Relations Act. The following passages from those reports, as well as those already quoted, permit of

no doubt as to the design of Congress to remedy the weakness contained in the Act's predecessor. The House Committee Report (H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 6–7) states:

> Public Resolution 44 has not proved much more satisfactory even in its provisions which had some virtue over the preexisting law, namely, the provisions for elections. * * * Any order issued by the Board under the authority of this section may be enforced or reviewed, as the case may be, by petition in the appropriate circuit court of appeals, following the procedure of the Federal Trade Commission Act.
>
> The weakness of this procedure is that under the provision for review of election orders employers have a means of holding up the election for months by an application to the circuit court of appeals. [The report here discusses instances of delay of elections by applications for review.] * * *
>
> The election is but a preliminary determination of fact, and there is no reason why employers should have an opportunity for court review prior to the holding of the election. The ability of employers to block elections has been productive of a large measure of industrial strife. When an employee organization has built up its membership to a point where it is entitled to be recognized as the representative of the employees for collective bargaining, and the employer refuses to accord such

> recognition, the union, unless an election can promptly be held to determine the choice of representation, runs the risk of impairment of strength by attrition and delay while the case is dragging on through the courts, or else is forced to call a strike to achieve recognition by its own economic power. Such strikes have been called when election orders of the National Labor Relations Board have been held up by court review.

The same report further states (*id.* at pp. 22–23):

> Where there are contending factions of doubtful or unknown strength, or the representation claims of the only organized group in the bargaining unit are challenged, there exists that potentiality of strife which the bill is designed to eliminate by the establishment of this machinery for prompt, governmentally supervised elections.

The Senate Committee Report (S. Rep. No. 573, 74th Cong., 1st Sess., pp. 5–6) states, under the heading "WEAKNESSES IN EXISTING LAW":

> *Obstacles to elections.*—Under Public Resolution 44, any attempt by the Government to conduct an election of representatives may be contested *ab initio* in the courts, although such election is in reality merely a preliminary determination of fact. This means that the Government can be delayed indefinitely before it takes the first step toward industrial peace. After almost a year not a single case, in which a com-

pany has chosen to contest an election order of the Board, has reached decision in any circuit court of appeals.

This break-down of the law is breeding the very evil which the law was designed to prevent. During the past year and a half the country has lived under the constant shadow of actual or impending warfare in factory and in mine. A large portion of this strife, which falls so heavily upon the general public, may be attributed to the evils enumerated above.

While, as appears from these reports, Congress apparently had foremost in its mind an intention to prohibit appeals to the courts prior to the holding of elections, it is clear that review of certifications was also intended to be precluded. See *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401. Thus, the reports construe Section 9 (d) as excluding review in every situation except the one therein provided. The statement of Senator Walsh to which reference has been made is to the same effect. Moreover, if the provision excludes review prior to elections it is exclusive in regard to any review; in the absence of any language suggesting a distinction the provision cannot be construed as exclusive for one purpose and as not exclusive for another.

Further reason for the view that review of certifications as well as of directions of elections was intended to be prohibited lies in the fact that review of certifications would be subject to the

same objection as motivated the prohibition of review prior to the holding of elections. This objection was that such review would result in delays in preventing employers from engaging in unfair labor practices (H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 6–7, 23; S. Rep. No. 573, 74th Cong., 1st Sess., pp. 5–6). If certifications were reviewable, it would be possible, just as in the case of directions of hearings or elections, for employers or competing labor organizations or even, perhaps, for individual employees, by filing appeals and applications for stays, to prevent the Board from proceeding under Section 10 pending final decision as to the validity of the certification.[20] And before such final decision it might well be that, due to the employer's continued violations of the Act or some other reason, the certified representative would have lost its majority or that a further investigation under Section 9 would be required. This investigation, too, would be subject in turn to review. Thus the collective bargaining provision of the Act (Section 8 (5)) might, in large part, be rendered inoperative.

There is no warrant for the view that Section 9 (d) was intended to be applicable primarily to employers and that Congress did not intend it to

[20] During the fiscal year ended June 30, 1944, the Board issued 1,468 certifications. National Labor Relations Board, *Ninth Annual Report* (Gov't Print. Off., 1944), p. 83. In the previous fiscal year the Board issued 1,243 certifications. National Labor Relations Board, *Eighth Annual Report* (Gov't Print. Off., 1943), p. 92.

limit review on petition of labor organizations, since a review by way of a proceeding under Section 10 of the Act might not be open to the latter. It is true that appeals by employers had focused attention on the need for preventing the delays occasioned by resort to the courts. But it is clear that the harm which Congress sought to avoid would be the same regardless of who might be responsible for the particular appeal. Moreover, as stated in this Court's opinion in the *American Federation of Labor* case (308 U. S. at 411, note 4), "Congress apparently recognized that representation proceedings under Section 9 (c) might involve rival unions."[21] Indeed in the very cases to which Congress adverted as illustrative of the delays resulting from judicial review (see H. Rep. No. 1147, pp. 6–7), separate suits had been brought by the employers and labor organizations with which the employers were already bargaining to enjoin action proposed to be taken by the Board at the instance of rival

[21] The Senate Committee Report, in the portion quoted, *supra*, p. 32, states, as a reason for the exclusiveness of the provisions in Section 9 (d), that "An election is the mere determination of a preliminary fact, and in itself has no substantial effect upon the rights of *either employers or employees*." [Italics supplied.] That Congress must have contemplated the possibility of appeals by labor organizations is further indicated by the statement of the House Committee (H. Rep. No. 1147, 74th Cong., 1st Sess., p. 22), quoted by this Court, that questions of representation would "ordinarily arise as between two or more bona fide organizations competing to represent the employees" (308 U. S. at 412, note 4).

labor organizations.[22] Furthermore, Section 9 (d) cannot be interpreted differently according to whether an employer or a labor organization seeks review. Whatever may have been the motives of Congress in barring review of representation cases unless the facts therein became in whole or in part support for an order under Section 10, review was nevertheless precluded.

We submit, therefore, that Congress, in foreclosing a review of certifications except as specified in Section 9 (d), appears clearly to have acted upon " 'the policy that the greater good is sometimes served by making certain classes of decisions final and ending litigation, even though in a particular case the individual is prevented by review from correcting some error which has injured him' " (*Crane* v. *Hahlo,* 258 U. S. 142, 148).[23]

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[22] *The Firestone Tire & Rubber Co.* v. *National Labor Relations Board* (Nos. 6957, 6967, 6969; C. C. A. 6); *The B. F. Goodrich Co.* v. *National Labor Relations Board* (Nos. 6958, 6968, 6970; C. C. A. 6). The suits were rendered moot by *Schechter Corp.* v. *United States,* 295 U. S. 495, holding the N. I. R. A. invalid.

[23] In this connection, it may be noted that in 1939 Senator Walsh introduced a bill (S. 1000, 76th Cong., 1st Sess.), sponsored by the American Federation of Labor, which would have amended Section 9 (d) to provide that "In any proceeding under section 9 which is not incidental to a proceeding under section 10, certification or denial thereof * * * shall constitute a final order and shall be reviewable upon the petition of any labor organization aggrieved * * *." During the hearings on that bill Mr. Padway, general counsel of the American Federation of Labor, testified before the Senate Committee on Education and Labor (Hearings on S. 1000, pt. 6, pp. 1148–1155), in substance,

C. *This Court's decision in the* Switchmen's *case.*—The correctness of our view that Congress did not intend to permit the broad grant of jurisdiction to federal district courts of all "suits and

that the amendment was needed because under the present Act, if an employer accepted a certification, a rival labor organization apparently had no right of review at all.

The Board filed with the Committee a report on the bill in which it stated that (Hearings, pt. 3, pp. 583, *et seq.*) the Act presently permits no direct court review of a certification and that in practice, therefore, under certain circumstances labor organizations apparently cannot obtain a court review of Board certifications. The Board proceeded to point out, however, that to permit such review would mean simply that "where two or more labor organizations are involved, the collective bargaining machinery of the act could not function" (Hearings, *supra*, p. 584); and that—"It is plain that the right to judicial review now proposed would enmesh the Board in litigation of overwhelming proportions and bring about delays due to lengthy court proceedings far surpassing those sought to be avoided by Congress when the act was passed. Congress then realized, upon the basis of a mere handful of election cases tied up in the courts by judicial review, that a serious menace to industrial peace existed. But the evil effect then being witnessed is insignificant in comparison with the results of judicial review in any appreciable proportion of the great number of representation cases being handled by the Board. [During the fiscal year ended June 30, 1944, the Board held over 4,700 elections and pay-roll checks, National Labor Relations Board, *Ninth Annual Report* (Gov't Print. Off., 1944), p. 20, and in the previous fiscal year it conducted about 4,150 elections and pay-roll checks, National Labor Relations Board, *Eighth Annual Report* (Gov't Print. Off., 1943), p. 95.] It is obvious that the present proposal, like the former court review which the present act prohibits, will increasingly breed the very evil which the law was designed to prevent, contrary to the public interest in the prompt determination of facts upon which industrial peace depends" (*id.* at p. 586). The Committee did not report the bill.

proceedings arising under any law regulating commerce" (Section 24 (8) of the Judicial Code, 28 U. S. C. 41 (8)) to be invoked in the case of representation proceedings under the National Labor Relations Act is, we submit, strongly reinforced by this Court's decision in *Switchmen's Union of North America* v. *National Mediation Board*, 320 U. S. 297.[24]

That case arose upon a suit by the Switchmen's Union in the district court to cancel the National Mediation Board's certification under Section 2, Ninth, of the Railway Labor Act, of a rival union, the Brotherhood, as the statutory representative of employees whom the Switchmen's Union claimed to represent as a separate unit. Section 2, Ninth, contains provisions for certification of representatives of railroad employees, which are in many respects analogous to those contained in Section 9 of the National Labor Relations Act. It provides:

> If any dispute shall arise among a carrier's employees as to who are the repre-

[24] See also *General Committee* v. *M.-K.-T. R. Co.*, 320 U. S. 323; *General Committee* v. *So. Pac. Co.*, 320 U. S. 338; *Brotherhood of Railway Clerks* v. *United Transport Service Employees*, 320 U. S. 715, reversing *per curiam*, 137 F. (2d) 817 (App. D. C.); *Order of Railway Conductors* v. *National Mediation Board*, 141 F. (2d) 366, 367 (App. D. C.), certiorari dismissed December 11, 1944, No. 200, this Term; *United Transport Service Employees* v. *National Mediation Board*, 141 F. (2d) 724, 725 (App. D. C.); *National Federation of Railway Workers* v. *National Mediation Board*, 141 F. (2d) 725, 726 (App. D. C.); cf. *Stark* v. *Wickard*, 321 U. S. 288.

sentatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the

> books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

The Railway Labor Act, like the National Labor Relations Act, contains no provisions expressly authorizing judicial review of certifications although it does contain provisions, as does the latter Act, for review of other types of administrative actions (Sections 3, First (p) and 9, Third (a)).

This Court held that "the District Court did not have the power to review the action of the National Mediation Board in issuing the certificate" (320 U. S. at 300). It stated that (p. 305), by reference to "the type of problem involved and the history of the statute," and the "highly selective manner in which Congress has provided for judicial review of administrative orders or determinations under the Act," the congressional intent as to representation disputes was plain—"the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law." We submit that the court below correctly held that this holding of this Court was dispositive of the issue of jurisdiction in a suit like the present one.

The "type of problem" involved, which this Court characterized in the *Switchmen's* case, 320 U. S. at 301, as "highly relevant" in determining

the Congressional intention as to review, is the same in both statutes. Cf. *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177 (distinguished in the *Switchmen's case*, 320 U. S. at 306). It is to settle disputes as to the representation of employees for collective bargaining. It is equally vital in each, for the same reasons in each, that there be "no dragging out of the controversy" in the courts (320 U. S. at 305). Moreover, the legislative history, which the Court stated in the *Switchman's* case was also a "highly relevant" consideration (320 U. S. at 301), establishes even more clearly in the case of the National Labor Relations Act than in the case of the Railway Labor Act, the intention of Congress to limit judicial review of representation proceedings under Section 9 (c) of the Act to that afforded in the circuit courts of appeals in connection with the review of orders in unfair labor practice cases based in whole or in part upon certifications issued by the Board in prior representation proceedings. This Congressional history has been reviewed (pp. 31–40, *supra*).

Each statute shows on its face the same "highly selective manner in which Congress has provided for judicial review of administrative orders or determinations under the Act." It may equally well be said of the Labor Relations Act, as this Court said of the Railway Labor Act (320 U. S. at 306), that "when Congress * * * provided for

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judicial review of two types of orders or awards and * * * omitted any such provision as respects a third type, it drew a plain line of distinction. And the inference is strong from the history of the Act that that distinction was not inadvertent." Cf. *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, 409–411.

The foregoing views were recently approved by the Circuit Court of Appeals for the Fourth Circuit in *Madden* v. *Brotherhood and Union of Transit Employees of Baltimore*, decided January 29, 1945, 15 L. R. R. 806. The case involved an appeal from an order of the district court enjoining the regional director of the National Labor Relations Board from conducting an election ordered by the Board under Section 9 (c) of the Act (59 N. L. R. B., No. 35). The Board had, in the course of the representation proceeding, investigated to determine whether the Brotherhood was a mere continuation of an old organization which the Board had previously found to be company-dominated and had directed to be disestablished in an order enforced by the circuit court of appeals (*National Labor Relations Board* v. *Baltimore Transit Co.* 140 F. (2d) 51 (C. C. A. 4), certiorari denied, 321 U. S. 795).[23] Upon finding that the Brother-

[23] Where it has appeared in a representation case that a labor organization seeking a place on the ballot was a successor of a labor organization which had been found by the Board to be company dominated in prior unfair labor practice

hood was merely a continuation of the old, unlawful organization, the Board had ordered that it not be placed upon the ballot in the election which it directed for the purpose of determining the bargaining representative. The district court, on petition of the Brotherhood, had enjoined the holding of this election on the ground that the Board had acted in excess of the power conferred upon it by Congress in Section 9 of the Act.

proceedings, it has been the Board's practice to give notice to all parties in the Section 9 proceeding that it would try, and it thereafter has tried, the issue of successorship in the representation case. *Matter of Dow Chemical Co.*, 32 N. L. R. B. 660; *Matter of R. G. LeTourneau, Inc.*, 36 N. L. R. B. 774; *Matter of Western Union Telegraph Co.*, 36 N. L. R. B. 812; *Matter of Swift & Co.*, 41 N. L. R. B. 1251; *Matter of H. E. Fletcher Co.*, 41 N. L. R. B. 420; *Matter of Wilson & Co., Inc.*, 45 N. L. R. B. 831; *Matter of J. Greenebaum Tanning Co.*, 49 N. L. R. B. 787; *Matter of New York Merchandising Co., Inc.*, 50 N. L. R. B. 41; *Matter of Phillips Petroleum Co.*, 52 N. L. R. B. 632; *Matter of Baltimore Transit Co.*, 59 N. L. R. B., No. 35. Also, in cases where it fortuitously appeared during the course of the representation proceeding that a labor organization seeking a place on the ballot was organized under governing rules by the terms of which the employer necessarily dominated the organization, or it appeared that the organization was formed by supervisory employees, the Board has refused to permit that organization to appear on the ballot. *Matter of Douglas Aircraft Co., Inc.*, 53 N. L. R. B. 486; *Matter of Phelps Dodge Corp.*, 6 N. L. R. B. 624; *Matter of Toledo Stamping & Mfg. Co.*, 55 N. L. R. B. 865. See also *Matter of Larus & Brother Co., Inc.*, Cases Nos. 5–R–1413, 5–R–1437, in which the Board recently ordered a certified organization to show cause why the certification should not be set aside on the ground, alleged by another union, that it does not admit Negro members of the bargaining unit to equal membership and does not bargain in their behalf as part of the unit.

The circuit court of appeals reversed the order of the district court on the ground that that court was without jurisdiction to entertain the Brotherhood's suit. It pointed out that (15 L. R. R. 806, 807):

> To enjoin the action of the Board on such ground, however, is to review proceedings taken by it in the exercise of power conferred by Congress and to reverse the Board's decision for error of law;

and it held that—

> * * * it is perfectly clear, we think, that such power of review has not been conferred on the courts. Only when an order of the Board is made pursuant to section 10 (c), and such order is based in whole or in part upon facts certified following an investigation pursuant to 9 (c), is judicial review of 9 (c) proceedings authorized; and in such case review is authorized by the Circuit Courts of Appeals, not by the District Courts.

The court cited with approval the decision of the Court of Appeals for the District of Columbia in the case at bar, noted that the decision was grounded upon the decision of this Court in the *Switchmen's* case, and stated that it likewise regarded the *Switchmen's* decision as controlling in the case of the Brotherhood.

Constitutional questions aside,[26] there is no warrant for a distinction, so far as judicial review of

[26] We show below, in Point II, that no constitutional question is presented by this case.

certifications is concerned, based upon the nature of the respects in which the administrative proceedings are claimed to be defective. In the case at bar the challenge to the proceedings is based upon the nature and timing of the hearing which the Board provided. The A. F. of L. claims that this hearing did not comport with the requirements of the statute and that the Board's action therefore was not within "the scope of the authority committed to it by Congress" (Pet. 18). In essence, this is no different than the contention made in the *Baltimore Transit* case, *supra*, pp. 46–48, that the Board had no power to investigate the question of company domination of the Brotherhood in the Section 9 proceeding, or a contention that the Board failed to find an appropriate unit, or that it improperly handled the election, or that it improperly excluded material evidence at the hearing. In all of these cases, too, it could fairly be said that the Board did not act within the scope of its statutory authority. Indeed, this was precisely the ground upon which the district court enjoined the election in the *Baltimore Transit* case. But at least so long as the alleged infirmity—inadequacy of hearing here—is not so great as to assume constitutional stature, there is no reason for reading an exception into the statutory provisions which contemplate finality, with but one qualification (pp. 29–30, *supra*), for the Board's certification.

The same considerations which impelled Congress to protect representation proceedings against judicial interference obviously apply with equal force in all such cases, no matter what the specific ground for attack may be. The protection which Congress afforded would be illusory indeed if it were to be denied whenever it was asserted that the Board had exceeded its statutory authority. It is noteworthy in this regard that in the *Firestone* and *Goodrich* cases (note 22, p. 40, *supra*), to which Congress adverted as illustrative of the evils resulting from judicial review which it sought to avert under this Act, it was alleged by the labor organizations seeking review that the orders of the old Board deprived them of their property without due process of law in that their contractual relations with the employers were being impaired "without opportunity to the Petitioners or the employees * * * to be heard adequately or to present testimony and argument to any Tribunal" (Petition of the Goodrich Co-operative Plan and others, p. 15 (par. e), No. 6970 (C. C. A. 6)), and that they were not given "any day in Court," referring to the alleged denial by the Board of adequate notice of hearing (Brief of Employees' Conference Plan of the Firestone Tire & Rubber Co., et al., pp. 65–66; see also Petition, p. 12, par. 11, No. 6969 (C. C. A. 6)). And in the *Switchmen's* case it was alleged in the district court that the Mediation Board was without jurisdiction under the

Railway Labor Act to proceed with its investigation and certification in that case because the documents seeking to invoke that Board's services "conclusively disclosed that no bona fide dispute in fact existed within the meaning of the Railway Labor Act" (Record, *Switchmen's* case, No. 48, October Term 1943, pp. 20–21). This allegation amounted essentially to an assertion that the Mediation Board had proceeded outside the scope of its authority but this Court nevertheless held that the district court had no jurisdiction to review the Board's action. See also *Brotherhood of Railway Clerks* v. *United Transport Service Employees*, 320 U. S. 715, reversing *per curiam*, 137 F. (2d) 817 (App D. C.); *Order of Railway Conductors* v. *National Mediation Board*, 141 F. (2d) 366, 367 (App. D. C.), certiorari dismissed December 11, 1944, No. 200, this Term.

The recent decisions of this Court in *Tunstall* v. *Brotherhood of Locomotive Firemen, etc.*, No. 37, this Term, and *Steele* v. *Louisville & Nashville Railroad Company et al.*, No. 45, this Term, decided December 18, 1944, do not support the A. F. of L.'s alleged cause of action.[27] In those cases, as the Court pointed out in the *Steele* opinion, the plaintiffs' suits asserted a duty, which the Court held the Railway Labor Act imposed upon the certified representative, to represent all members of the craft or group "without hostile dis-

[27] Cf. also, *Stark* v. *Wickard*, 321 U. S. 288.

crimination, fairly, impartially, and in good faith." The *Steele* case, slip-sheet opinion, p. 9. The violation of this duty was not determinable, as the Court stated (*id.* at p. 9), under the administrative scheme set up in the Railway Labor Act, and the "right [thus created] would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation * * *" (*id.* at p. 11). The Court held that in these circumstances the statute must be construed as contemplating "resort to the usual judicial remedies of injunction and award of damages when appropriate for breach of that duty" (*id.* at p. 12).

Thus, the *Tunstall* and *Steele* cases present situations which the Court expressly distinguished in the *Switchmen's* case. The Court stated (the *Switchmen's* case (320 U. S. at 300–301)):

> If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control. That was the purport of the decisions of this Court in *Texas & New Orleans R. Co.* v. *Brotherhood of Clerks*, 281 U. S. 548, and *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515. In those cases it was apparent that but for the general jurisdiction of the federal courts there would be no remedy to enforce

the statutory commands which Congress had written into the Railway Labor Act. The result would have been that the "right" of collective bargaining was unsupported by any legal sanction. That would have robbed the Act of its vitality and thwarted its purpose. Such considerations are not applicable here. The Act in § 2, Fourth writes into law the "right" of the "majority of any craft or class of employees" to "determine who shall be the representative of the craft or class for the purposes of this Act." That "right" is protected by § 2, Ninth which gives the Mediation Board the power to resolve controversies concerning it and as an incident thereto to determine what is the appropriate craft or class in which the election should be held. See *Brotherhood of Railroad Trainmen* v. *National Mediation Board,* 88 F. 2d 757; *Brotherhood of Railroad Trainmen* v. *National Mediation Board,* 135 F. 2d 780. A review by the federal district courts of the Board's determination is not necessary to preserve or protect that "right."

In the case at bar, just as in the *Switchmen's* case, the considerations applicable in the *Tunstall* and *Steele* cases are not present. The Labor Relations Act, in Section 9 (a) writes into law the right of "the majority of the employees" to designate or select their "exclusive representatives" for collective bargaining purposes. That right is protected by Section 9, subsections (b) and (c), which gives the Board power to resolve controversies

concerning the selection of representatives. Here, as in the *Switchmen's* case, "a review by the federal district courts of the Board's determination is not necessary to preserve or protect that 'right'." The *Switchmen's* case, *supra.*

D. *The foregoing interpretation of the Act raises no substantial question as to its constitutionality.*—The foregoing interpretation of the Act, denying court review of Board certifications except in the limited manner expressly provided in Section 9 (d), raises no substantial question as to its constitutionality. "That due process of law does not necessarily require the interference of the judicial power is laid down in many cases and by many eminent writers upon the subject of constitutional limitations. * * * 'There is nothing in these words, * * * that necessarily implies that due process of law must be judicial process.'" *Public Clearing House* v. *Coyne,* 194 U. S. 497, 508–509. "The authority for a judicial examination of the validity of the [administrative] action is found in the existence of courts and *the intent of Congress* * * *" (italics supplied). *Stark* v. *Wickard,* 321 U. S. 288, 308. See also *American Federation of Labor* v. *National Labor Relations Board,* 308 U. S. 401, in which this Court determined whether judicial review was available by "analyzing the provisions of the statute in order to ascertain the true meaning * * *." (*id.* at p. 408).

That the Fifth Amendment does not necessarily require that there be opportunity for judicial review of Board certifications under Section 9 of the National Labor Relations Act is particularly clear in view of the provision of Section 9 (c), which requires a hearing before the Board. As this Court said in *Reetz* v. *Michigan*, 188 U. S. 505, 507, "* * * we know of no provision in the Federal Constitution which forbids a State from granting to a tribunal, whether called a court or a board of registration, the final determination of a legal question. * * * *Due process is not necessarily judicial process.*" [Italics supplied.] See, also, *Public Clearing House* v. *Coyne*, *supra*; *Butte, Anaconda & Pacific Ry. Co.* v. *United States*, 290 U. S. 127, 136, 142–143; *United States* v. *Ju Toy*, 198 U. S. 253, 263; *Passavant* v. *United States*, 148 U. S. 214, 219, 222; *Barry* v. *Hall*, 98F. (2d) 222, 225 (App. D. C.); cf. *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 342, 343; *Crane* v. *Hahlo*, 258 U. S. 142, 147; *United States* v. *Los Angeles R. R. Co.*, 273 U. S. 299, 309–310, 313, 314.

The decision of this Court in the *Switchmen's* case disposes of any constitutional impediment to the denial of judicial review under the circumstances of this case. It was there held that Congress could deny judicial review of certifications under the Railway Labor Act. There is no requirement that the Railway Mediation Board hold

a hearing before it issues its certifications under Section 2, Ninth; Section 9 (c) of the National Labor Relations Act, on the other hand, requires the National Labor Relations Board to provide for an "appropriate hearing" in certification cases. It follows, therefore, *a fortiori*, that the Due Process Clause is not violated by Congressional denial of judicial review of certifications under the National Labor Relations Act.

In the *Switchmen's* case this Court said (320 U. S. at 303):

> The fact that the certificate of the Mediation Board is conclusive is of course no ground for judicial review. *Great Northern Ry. Co.* v. *United States,* 277 U. S. 172, 182. Congress has long delegated to executive officers or executive agencies the determination of complicated questions of fact and of law. And where no judicial review was provided by Congress this Court has often refused to furnish one even where questions of law might be involved. See *Louisiana* v. *McAdoo,* 234 U. S. 627, 633; *United States* v. *George S. Bush & Co.,* 310 U. S. 371; *Work* v. *Rives,* 267 U. S. 175; *United States* v. *Babcock,* [250 U. S. 328]. We need not determine the full reach of that rule. See *Bates & Guild Co.* v. *Payne,* 194 U. S. 106; *Houston* v. *St. Louis Independent Packing Co.,* 249 U. S. 479. But its application here is most appropriate by reason of the pattern of this Act.

We submit that this is equally true of the pattern, history, and purposes of the National Labor Relations Act.

II

THE COMPLAINT SHOWS ON ITS FACE THAT THE PROCEDURE FOLLOWED BY THE BOARD AFFORDED THE A. F. OF L. A HEARING WHICH SATISFIED DUE PROCESS REQUIREMENTS

It appears from the face of the A. F. of L.'s complaint, and from the uncontroverted facts hereinabove described and appearing in the Board's decisions (see note 2, p. 3, *supra*), that the procedure followed by the Board which led up to the certification fully satisfied the Due Process requirements of the Fifth Amendment to the Constitution. Therefore, no constitutional question is involved in this case.

It is well settled that the Due Process Clause guarantees no particular form of procedure—"the requirements are not technical" (*Morgan* v. *United States*, 298 U. S. 468, 481)—but goes to the protection of substantial rights and requires only such hearing and notice as is commensurate with the necessities of the particular case and the character of the rights affected. *Buttfield* v. *Stranahan*, 192 U. S. 470, 496–497; *National Labor Relations Board* v. *Mackay Radio & Tel. Co.*, 304 U. S. 333, 350, 351; *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 342, 343; *United States* v. *Ju Toy*, 198 U. S. 253, 263; *C. B. & Q. Railroad*

v. *Chicago*, 166 U. S. 226, 235; *Phillips* v. *Commissioner*, 283 U. S. 589, 596–597.[28] It is obvious, we think, that the procedures followed by the Board in the instant case meet this test.

Here, it is clear, and the A. F. of L. makes no contrary claim, that before the Board made its final determination of the case—the certification,[29] the A. F. of L. had had full opportunity to present to the Board all relevant evidence bearing upon the investigation and to be fully heard. There is no claim that at either of the two hearings directed by the Board at which evidence was taken, the A. F. of L. was improperly limited in adducing evidence, nor is it claimed that the A. F. of L. was in any way limited in respect to the showing it was permitted to make on the return of the Board's notice to show cause. The A. F. of L.'s whole complaint is based upon the thesis that due process required the Board as a matter of inexorable right, when the C. I. O. requested certification the second time, automati-

[28] Undoubtedly, this is all that is intended by the requirement in Section 9 (c) that the Board conduct an "appropriate" hearing. "The hearing required to be held in any such investigation [under Section 9 of the Act] provides an appropriate safeguard and opportunity to be heard." Report of the House Committee on Labor (H. Rep. No. 1147, 74th Cong., 1st Sess., p. 23).

[29] It is settled that a direction of election is but an intermediate step and a certification is the final step in representation proceedings under Section 9. *National Labor Relations Board* v. *International Brotherhood of Electrical Workers*, 308 U. S. 413, 414–415.

cally to set the matter down for another hearing to adduce further evidence, instead of first requiring the A. F. of L., as it did, to show that there was a need for such a further hearing. This thesis rests, in turn, upon the A. F. of L.'s notion that the "issues" at the time of the first hearing were different than they were when the C. I. O. requested the company-wide unit, and that the second hearing, held after the election had been conducted, was inappropriate as a substitute for the hearing which it says should have been provided at an earlier stage of the proceedings. We think these contentions are palpably without merit.

During the first hearing, the A. F. of L. had opposed the C. I. O.'s request for certification as the representative of the Company's employees, on the ground that the units of three plants which the C. I. O. proposed were inappropriate because these groups of employees were but a part of a large group, consisting of all of the Company's employees, on whose behalf the A. F. of L. already had established bargaining relationships with the employer, The Board had agreed with the A. F. of L. The C. I. O.'s second petition, filed three days later, obviously was but an acquiescence in this position. Moreover, at the first hearing, the A. F. of L. presumably had fully advanced whatever contentions it desired to make as to the effects of its contracts, the inclusion or

exclusion from the unit of fringe groups of employees, the appropriate pay roll for eligibility to vote in any election, and other matters affecting the method of conducting the balloting." Further, contrary to the A. F. of L.'s present contention, the "issues" involved in the second petition were not substantially different from those involved in the first petitions. The controversy still was, basically, a contest between the A. F. of L. and the C. I. O. for collective bargaining representation of the employees of the Company, and the matters for the Board to determine were essentially the same in each instance. As has been stated, it was to be presumed that the parties to the controversy had made their respective positions clear in the first hearing.

In this situation it was entirely appropriate, we submit, for the Board to proceed as it did, to propose to treat the second petition as merely in the nature of an amendment to the earlier proceedings, and to proceed to a redetermination of the representation dispute on the record already made unless the parties showed why that record was inadequate and why further testimony should

[30] The A. F. of L. obviously could not know at the time of this hearing that the Board would dismiss the C. I. O. petitions on the ground of inappropriate unit. Accordingly, it must be presumed that it had made its position clear on all matters affecting the election which might be ordered by the Board and that it had adduced whatever available evidence it desired to support its contentions.

be taken. Upon the return of the notice to show cause, the A. F. of L. opposed the proposed procedure generally but neither alleged any facts showing why the proposed procedure was in fact inappropriate in any respect nor pointed to any material evidence which it desired to adduce or to any other need for a hearing to receive further evidence. The A. F. of L. complained only that the decision should not be based upon the field examiner's report and investigation, that the Board had no authority to set aside an existing contract, and that the employees at the Potlatch Unit plant and the Rutledge Unit plant would be deprived of an opportunity to demonstrate their bargaining status. These contentions primarily involved questions of law and administrative policy which had long since been settled, and any factual issues embraced had been fully canvassed at the first hearing (see pp. 8–12, *supra*). In these circumstances, this opportunity to oppose the proposed procedure and to show the necessity for the taking of further evidence, was all that an "appropriate hearing" of the controversy as to representation required. Indeed, for the Board to have proceeded in this situation to set the matter down for taking of further evidence, when on the face of things a hearing for that purpose was not needed, would have been inappropriate, as a waste of time and of public and private funds.

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But the Board did more than provide the foregoing "appropriate hearing." When, subsequently, in the course of the Board's investigation, after an election had been had among the employees, the A. F. of L. protested against the procedures followed and the conduct of the ballot, the Board ordered that a formal hearing be had upon the matters raised in the A. F. of L.'s protest. At this hearing the A. F. of L. undisputedly was accorded full opportunity to be heard and to adduce all relevant evidence bearing upon all contentions which it desired to raise. Only after this further full hearing was had, did the Board proceed to a final consideration and determination of the case. It cannot be assumed that merely because the Board considered this evidence and the A. F. of L.'s contentions, after the election instead of before, the consideration which it gave to them was any less full, fair, and impartial, and its final determinations any less a reflection of its considered judgment upon the whole record.

It is thus apparent, we think, that the A. F. of L.'s due process allegations amount, at best, to no more than an assertion that although the hearings provided were commensurate with the necessities of the case and were fully adequate to permit the A. F. of L. to make its contentions known and to support them by evidence and argument, they were nevertheless short of due process because held at one stage of the proceedings before final determination instead of at another. The A. F.

of L. suggests (Br. 34–35) that a hearing after the election "would unavoidably and unfairly affect the rights of parties by reason of the announcement of election results and the influence thereof in units which might be later found to be inappropriate." But that has no bearing on this case, for the Board, at its later hearing, found that the determination of the unit and the conduct of the election were, in every way, proper. These findings, the A. F. of L. apparently concedes, are conclusive.

The Constitution is not concerned with ritual which affects no substantial rights. See cases cited pp. 57–58, *supra*. This Court has repeatedly held that a hearing need not be held at any particular time and that it may be held at any time before final judgment is entered. *Opp Cotton Mills* v. *Administrator, Wage and Hour Division*, 312 U. S. 126, 152–153; *Nickey* v. *Mississippi*, 292 U. S. 393, 396; *United States* v. *Illinois Central R. Co.*, 291 U. S. 457, 463; *Wells, Fargo & Co.* v. *Nevada*, 248 U. S. 165, 168; *Wilson* v. *Standefer*, 184 U. S. 399, 415; *Gallup* v. *Schmidt*, 183 U. S. 300, 307. Indeed, this Court has held that due process requirements were met even in situations where no hearings were held before judgment, provided an opportunity to be heard fully was afforded on appeal. *York* v. *Texas*, 137 U. S. 15, 20–21; *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 168; *George Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 384.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below is correct and the decree should be affirmed.

CHARLES FAHY,
Solicitor General.

ALVIN J. ROCKWELL,
General Counsel,
RUTH WEYAND,
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FEBRUARY 1945.

APPENDIX A

In the Matter of POTLATCH FORESTS, INC. *and* LOCALS 10–358 AND 10–361, INTERNATIONAL WOODWORKERS OF AMERICA, AFFILIATED WITH THE C. I. O.

In the Matter of POTLATCH FORESTS, INC. *and* LOCAL 10–364, INTERNATIONAL WOODWORKERS OF AMERICA, AFFILIATED WITH THE C. I. O.

Cases Nos. R–5373 and R–5374 respectively.—Decided July 13, 1943

[51 N. L. R. B. 288]

DECISION AND ORDER

STATEMENT OF THE CASE

Upon petitions duly filed by Locals 10–358, 10–361, and 10–364, International Woodworkers of America, affiliated with the C. I. O., herein collectively called the C. I. O.,[1] alleging that ques-

[1] The original petitions were filed by Locals 358 and 361, International Woodworkers of America, affiliated with the C. I. O. and by International Woodworkers of America, C. I. O., Local 364. At the hearing the C. I. O. made a motion to change its titles to Locals 10–358, 10–361, 10–364, International Woodworkers of America, affiliated with the C. I. O., and to amend the petitions with regard to the units

tions affecting commerce had arisen concerning the representation of employees of Potlatch Forests, Inc., Lewiston, Idaho, herein called the Company, the National Labor Relations Board consolidated the cases and provided for an appropriate hearing upon due notice before John E. Hedrick, Trial Examiner. Said hearing was held at Lewiston, Idaho, on May 14 and 15, 1943. The Company, the C. I. O., and Locals 2679, 2664, 2923, 2766, and 2584, Lumber and Sawmill Workers' Union, chartered by the United Brotherhood of Carpenters and Joiners of America, affiliated with the A. F. of L., by the Northwestern Council Lumber and Sawmill Workers, herein collectively called the A. F. L., appeared, participated, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. The A. F. L. moved to dismiss the petitions herein on the ground, among others, that the units sought by the C. I. O. were not appropriate. The Trial Examiner reserved ruling upon this motion. For reasons appearing hereinafter, the motion of the A. F. L. is granted. The Trial Examiner's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The A. F. L. submitted a brief and a supplemental brief, which the Board has considered.

Upon the entire record in the case, the Board makes the following:

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sought and the business of the Company. This motion was granted by the Trial Examiner and the petitions were amended in accordance therewith.

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

Potlatch Forests, Inc., a Maine corporation, is engaged in the general logging, sawmill, mill, and manufacturing business. It cuts timber into logs, saws and mills logs into lumber and lumber products, and sells such products throughout the United States. It owns and operates three subsidiary corporations known as the Forest Development Company, the Washington-Idaho-Montana Railroad, a common carrier, and Wood Briquets, Inc. In addition thereto, it owns and conducts five operations consisting of three mills known as the Potlatch Unit Plant, located at Potlatch, Idaho, the Rutledge Unit Plant, located at Coeur d'Alene, Idaho, and the Clearwater Unit Plant, located at Lewiston, Idaho, and two logging departments known as Clearwater Logging Department, located at Headquarters, Idaho, and the Bovill Logging Department, located at Bovill, Idaho. The Company owns and operates several camps in connection with its two logging departments. In 1942, the Company disposed of 462,743,536 board feet of lumber, of which 449,449,383 board feet were sold to customers. During the same period, 96 percent of the products of the Company was shipped to points outside the State of Idaho. We find that the Company, in the conduct of its five operations and through its subsidiaries, is engaged in commerce within the meaning of the National Labor Relations Act.

II. THE ORGANIZATIONS INVOLVED

Locals 10–358, 10–361, and 10–364, International Woodworkers of America are labor organizations affiliated with the Congress of Industrial Organizations, admitting to membership employees of the Company.

Locals 2679, 2664, 2923, 2766, and 2584, Lumber and Sawmill Workers' Union, chartered by the United Brotherhood of Carpenters and Joiners of America, are labor organizations affiliated with the Northwestern Council Lumber and Sawmill Workers, an affiliate of the American Federation of Labor, admitting to membership employees of the Company.

III. THE ALLEGED APPROPRIATE UNIT

The principal issue involved herein is whether the units sought to be established by the C. I. O. are appropriate.[2] The C. I. O. contends that the employees of each of the three operations of the Company which it desires to represent constitute separate and distinct appropriate units.[3] The A. F. L. contends that all five operations constitute an appropriate unit. The Company takes no position with respect to this issue or to any of the issues involved herein; it appeared at the hearing merely for the purpose of assisting the Board in its investigation.

[2] In view of our finding hereinafter set forth, we deem it unnecessary to determine whether the collective bargaining contracts of the A. F. L. and its locals with the Company constitute a bar to a present determination of representatives.

[3] The C. I. O. seeks to represent the Clearwater Unit Plant, the Clearwater Logging Department, and the Bovill Logging Department as separate units.

The Company conducts all of its operations in the northwestern portion of the State of Idaho. It is approximately 90 miles from the Clearwater Unit plant at Lewiston to the Clearwater Logging Department at Headquarters, which is its source of timber. The Bovill Logging Department, which supplies the Potlatch and Rutledge Mills with timber, is approximately 25 miles from Potlatch and about 100 miles from Coeur d'Alene, where the Rutledge Unit plant is located. Connected with each of the logging operations are the various logging camps operated by the Company. At each of the unit plants there are mills and facilities for making "Presto Logs," the product of Wood Briquets, Inc., a subsidiary of the Company. Lewiston is about 65 miles from Potlatch and about 135 miles from Coeur d'Alene. Bovill is approximately 60 miles from Headquarters, but due to the terrain it is necessary to use an indirect route traveling from one logging operation to another, and thus the distance is approximately 100 miles.

On occasion, the Company has shifted timber from Clearwater Logging Department to the mill at Potlatch; it has transferred lumber carriers and lift equipment, together with their crews, from one mill to another, and has even transferred an entire shift from one mill to another. In addition there is some interchange of personnel between the logging operations at Bovill and Headquarters. The record also discloses one instance in which mill workers were transferred to a logging department for a short time, and were later returned to the mill without loss of seniority. In spite of this interchangeability of personnel, the distances between the operations of the Company

make it unfeasible for all of its employees to gather at one place, and for this reason they had been represented upon a unit basis, which the A. F. L. later consolidated, keeping, however, as hereinafter indicated, a local organization at each of the operations of the Company.

The three unit plants, prior to their representation by the A. F. L., were represented for the purposes of collective bargaining on a unit basis by the Loyal Legion of Loggers and Lumbermen, which subsequently became the Independent Employee's Union, herein called the I. E. U. On September 13, 1937, the A. F. L. filed charges alleging that the Company and the I. E. U. were engaging in unfair labor practices.[4] The Board, on January 25, 1940, ordered the I. E. U. disestablished and ordered that the Company withdraw its recognition of the I. E. U. and its locals.[5] Subsequent to the filing of these charges, the A. F. L. became the bargaining representative for the employees of each of the mills of the Company, either by cross-check or consent election conducted by the Board,[6] or upon the basis of a consent election held under other auspices.[7]

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[4] *Matter of Potlatch Forests, Inc.*, 19 N. L. R. B. 887.

[5] 19 N. L. R. B. 945.

[6] Case No. 19–C–634 (Potlatch Unit plant). In 1938, the C. I. O. filed a petition seeking to represent the employees of the Rutledge Unit plant (Case No. 19–R–265); however, it lost the election conducted as part of that proceeding. In February 1941, it again filed a petition seeking to represent these employees (Case No. 19–R–662). As part of this proceeding, a consent election was conducted in which both the C. I. O. and the A. F. L. were on the ballot. The election resulted in the selection of the A. F. L. as the bargaining representative of these employees.

[7] The Clearwater Unit plant.

The employees of the Logging Departments were first represented by the I. W. W. in separate units. However, in 1939, the A. F. L. filed separate petitions,[8] seeking to represent the employees of each of these departments. Both proceedings resulted in cross-checks in which the A. F. L. was chosen as the bargaining representative.

Thus, by 1941, the A. F. L. had successfully organized and been selected as bargaining representative of the employees of each of the five operations of the Company. On June 5, 1941, the Company and the five locals of the A. F. L.[9] executed a "Master Contract" effective as of June 1 covering all five operations of the Company. This contract was signed on behalf of the A. F. L. by representatives of the five locals, as well as by the Inland Empire District Council, herein called the Council.[10] The contract provided for recognition of the A. F. L. by the Company as the exclusive bargaining agency for all its production and maintenance employees, as well as for uniform regulations with regard to the adjustment of grievances, wages, hours, and other conditions of employment. In addition thereto, it provided that "supplemental and strictly local agreements shall be negotiated by the local unions * * * with the local managers * * * covering strictly local matters" and the following clause was appended:

> It is understood and agreed that the Master Agreement of June 1, 1941, shall have no force and effect until the local

[8] Cases Nos. 19–R–339, 19–R–340.

[9] As hereinabove indicated, the A. F. L. organized each operation of the Company separately, setting up a local at each.

[10] The A. F. L. locals were members of the Council.

unions and the Company divisions have agreed upon and signed the local agreements required by the Master Agreement.

Subsequent thereto, the managers of each of the operations signed supplemental contracts with the locals, thus carrying out the provisions of the Master Contract. These local contracts covered purely local affairs, and took the form of a collection of amendments to corresponding sections in the Master Agreement. The Master Contract was subsequently renewed on May 29, 1942.

From the facts set forth above, we are of the opinion that the collective bargaining between the Company and the A. F. L. and its various locals clearly indicates the propriety of a unit consisting of the logging and mill employees of the Company. The bargaining on matters of wages, hours, and general working conditions has been conducted by the A. F. L. for all the production and maintenance employees of the Company. The local agreements have been on matters of an essentially local character, and are not inconsistent with bargaining upon a company-wide basis. They merely implement the basic conditions and general principles established by the Master Contract and adapt them to the conditions peculiar to each operation. Manifestly, it would be unrealistic for the parties to make uniform provisions on all subjects with no allowance for leaving purely local matters to be adjusted on a local basis. Upon the entire record, we are convinced that the primary matters of collective bargaining have been negotiated on a company-wide basis for the production and maintenance employees of the Company and that the bargaining engaged in by

each of the locals has been of a limited and supplementary character. Accordingly, we find that units consisting solely of the employees of the three operations of the Company which the C. I. O. seeks to represent are inappropriate.

IV. THE QUESTION CONCERNING REPRESENTATION

Since the bargaining units sought to be established by the petitions are inappropriate, as stated in Section III, above, we find that no question has arisen concerning the representation of employees of the Company in an appropriate bargaining unit.

ORDER

Upon the basis of the foregoing facts, the National Labor Relations Board hereby orders that the petitions for investigation and certification of representatives of employees of Potlatch Forests, Inc., Lewiston, Idaho, filed by Locals 10–358, 10–361, 10–364, International Woodworkers of America, C. I. O., be, and they hereby are, dismissed.

Signed at Washington, D. C., this 14th day of July 1943.

[SEAL]

HARRY A. MILLIS,
Chairman,
GERARD D. REILLY,
Member,
JOHN M. HOUSTON,
Member,
National Labor Relations Board.

In the Matter of POTLATCH FORESTS, INC. *and* LOCALS 10–358 and 10–361, INTERNATIONAL WOODWORKERS OF AMERICA, AFFILIATED WITH THE C. I. O.

In the Matter of POTLATCH FORESTS, INC. *and* LOCAL 10–364, INTERNATIONAL WOODWORKERS OF AMERICA, AFFILIATED WITH THE C. I. O.

In the Matter of POTLATCH FORESTS, INC. *and* INTERNATIONAL WOODWORKERS OF AMERICA, AFFILIATED WITH THE C. I. O.

Cases Nos. R–5373 (19–R–1058), R–5374 (19–R–1083) and 19–R–1164 respectively.—Decided October 14, 1943

[52 N. L. R. B. 1377]

DECISION
AND
DIRECTION OF ELECTION

STATEMENT OF THE CASE

On July 13, 1943, the National Labor Relations Board, herein called the Board, issued a Decision and Order in the above-entitled proceeding,[1] dismissing the petitions of Locals 10–358, 10–361, and 10–364, International Woodworkers of

[1] 51 N. L. R. B. 288.

America, affiliated with the Congress of Industrial Organizations, herein collectively called the C. I. O., on the ground that the units sought therein were inappropriate for the purposes of collective bargaining.

On July 16, 1943, the C. I. O.[2] filed with the Regional Director for the Nineteenth Region (Seattle, Washington) a further petition, which was thereafter designated as Case No. 19–R–1164, requesting an investigation and certification of employees of the Company in a unit different from those previously requested. On August 11, 1943, the C. I. O. filed with the Board a motion requesting that the record in Cases Nos. R–5373 and R–5374 be reopened and consolidated with Case No. 19–R–1164, and that an election be directed among employees in the unit sought in the last numbered case without hearing; or, in the alternative, that the record in Cases Nos. R–5373 and R–5374 be incorporated in Case No. 19–R–1164, and that an election be directed.

On September 14, 1943, the Board issued a Notice to Show Cause why (1) the Decision and Order in Cases Nos. R–5373 and R–5374 should not be vacated; (2) the petitions in those cases should not be reinstated; (3) the petition in Case No. R–1164 should not be made a part of the record in Cases Nos. R–5373 and R–5374 and considered as an amendment to the petitions in said cases; (4) the statement of the Field Examiner concerning claims of authorization for the purpose of representation in Case No. 19–R–1164

[2] The petition in Case No. 19–R–1164 was filed by International Woodworkers of America, affiliated with the C. I. O.

should not be made part of the record in Cases Nos. R–5373 and R–5374; and (5) the Board should not reconsider the Decision and Order in Cases Nos. R–5373 and R–5374, as thus supplemented, and proceed to a new decision without further hearing.

Inland Empire District Council, Lumber & Sawmill Workers Union, American Federation of Labor, herein called the A. F. L.,[3] thereafter filed "Protest and Objection to Order of September 14, 1943," alleging that (a) said order contemplates a decision by the Board without the taking of evidence which would be based partially upon a report and investigation of the Regional Director[4] which was not served upon the A. F. L.,[5] and, therefore, as to it is hearsay and *ex parte*, since the A. F. L. is deprived of an opportunity to cross-examine with respect thereto; (b) the employees at two of the Company's mills located at Potlatch and Coeur D'Alene, Idaho, respectively, would be deprived of an opportunity to demonstrate their bargaining status, inasmuch as they had no such opportunity under the former hearing, nor at any time since, to present evidence on their own behalf, and (c) the Board has no authority to set aside an existing contract by such proceedings.

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[3] The A. F. L. appeared in the original hearing as Locals 2679, 2664, 2923, 2766, and 2584, Lumber and Sawmill Workers Union chartered by the United Brotherhood of Carpenters and Joiners of America, affiliated with the A. F. L., by the Northwestern Council Lumber and Sawmill Workers.

[4] The investigation and report and the revised report hereinafter set forth were each made by the Field Examiner.

[5] Service of a copy of the Field Examiner's report was later admitted.

For reasons hereinafter stated, the Board is of the opinion that insufficient cause to the contrary has been shown, and hereby vacates the Decision and Order in Cases Nos. R–5373 and R–5374, reinstating the petitions in these cases, making the petition in Case 19–R–1164 a part of the record in Cases Nos. R–5373 and R–5374, and treating it as an amendment to the petitions in those cases, and making the "Statement of Field Examiner concerning claims of authorization for the purpose of representation," and the "Revised Statement of Field Examiner concerning claims of authorization for the purpose of representation" in Case No. 19–R–1164 a part of the record in Cases Nos. R–5373 and R–5374.

Upon the entire record in the case, the Board makes the following:

Findings of Fact

I. The Business of the Company

Potlatch Forests, Inc., a Maine corporation, is engaged in the general logging, sawmill, mill, and manufacturing business. It cuts lumber into logs, saws and mills logs into lumber and lumber products and sells such products throughout the United States. It owns and operates three subsidiary corporations known as the Forest Development Company, the Washington-Idaho-Montana Railroad, a common carrier, and Wood-Briquets, Inc. In addition thereto, it owns and conducts five operations consisting of three mills known as the Potlatch Unit Plant located at Potlatch, Idaho, the Rutledge Unit Plant, located at Coeur

d'Alene, Idaho, and the Clearwater Unit Plant, located at Lewiston, Idaho, and two logging departments known as the Bovill (or Potlatch) Logging Department, located at Bovill, Idaho, and the Clearwater Logging Department, located at Headquarters, Idaho. The Company owns and operates several camps in connection with its two logging departments. We are concerned herein with the mill and logging operations of the Company. In 1942 the Company disposed of 462,743,536 board feet of lumber, of which 449,449,383 board feet were sold to customers. During the same period 96 percent of the products of the Company was shipped to points outside the State of Idaho. We find that the Company, in the conduct of its five operations, is engaged in commerce within the meaning of the National Labor Relations Act.

II. THE ORGANIZATIONS INVOLVED

International Woodworkers of America is a labor organization affiliated with the Congress of Industrial Organizations, admitting to membership employees of the Company.

Inland Empire District Council, Lumber & Sawmill Workers Union, is a labor organization affiliated with the American Federation of Labor, admitting to membership employees of the Company.

III. THE QUESTION CONCERNING REPRESENTATION

The A. F. L., after organizing and becoming the bargaining representative of the employees at each of the five milling and logging operations of

the Company,[5] executed a contract with the Company on June 5, 1941, retroactive to June 1, 1941, in which it combined all five operations within a single unit. This contract, however, preserved to the locals of the A. F. L. at the separate operations of the Company a limited autonomy for the purposes of local administration. The contract provided that it could be modified or terminated upon sixty (60) days' written notice by either party, and that in the absence of such notice it was automatically terminated on June 1, 1942. However, the contract was subsequently renewed on May 29, 1942, such renewal expiring on June 1, 1943.[7]

By letters dated March 9 and 29, 1943, the C. I. O. through certain of its locals requested that the Company recognize it as the bargaining representative of its employees at its milling operations at Lewiston, Idaho, and its two logging operations located at Headquarters and Bovill, Idaho, respectively. The Company replied by letters in which it stated that the A. F. L. was the current bargaining representative of these employees, and that the question of majority representation must be determined by the Board. Since the original notices given by the C. I. O. were timely,[8] and because the contract of June 5,

[5] The Board issued certification to the A. F. L. on 4 of these occasions of which 3 were the result of cross-checks pursuant to stipulation, and 1 the result of an election held pursuant to a stipulation.

[7] The Board has received notice that the contract has again been renewed since the entertainment of the original petitions herein.

[8] See *Matter of Dain Manufacturing Company*, 41 N. L. R. B. 1056; *Matter of United States Rubber Company*, 41 N. L. R. B. 1005.

1941, as subsequently renewed, is terminable at any time upon sixty (60) days' notice, we find that it does not constitute a bar to the instant proceeding.[9]

Statements of the Field Examiner in Case No. 19–R–1164, which have been made part of the record in the original cases, indicate that the C. I. O. represents a substantial number of employees in the unit hereinafter found appropriate.[10]

We find that a question affecting commerce has arisen concerning the representation of employees

[9] *Matter of Todd-Johnson Dry Docks, Inc.*, 10 N. L. R. B. 629–632; see also, *Matter of Guistina Brothers Lumber Company*, 41 N. L. R. B. 1243.

[10] The Field Examiner reported that the C. I. O. submitted 1100 application cards bearing apparently genuine signatures of persons appearing on the Company's pay roll of July 21, 1943. Said pay roll contained approximately 3177 names of employees within the appropriate unit. He further reported, in a revised statement, that by September 25, 1943, the C. I. O. had submitted a total of 1151 application cards bearing apparently genuine original signatures of persons whose names appear on the afore-mentioned pay roll.

The contract of June 5, 1941, as subsequently renewed, sufficiently establishes the interest of the A. F. L. in this proceeding.

As noted above, the A. F. L. objected to the inclusion of the Field Examiner's statements with the exhibits in Cases Nos. R–5373 and R–5374 on the ground that such statements are hearsay and, as to the A. F. L., *ex parte;* it further objected to its inclusion because it had not been given an opportunity to cross-examine with respect to the facts contained therein. Both objections are without merit. Such statements are based upon Board investigations which are necessarily *ex parte;* they are not offered as final proof of representation.

of the Company, within the meaning of Section 9 (c) and Section 2 (6) and (7) of the Act.

IV. THE APPROPRIATE UNIT

The C. I. O. at the hearing originally sought three separate units in conformance with its petitions in Cases Nos. R–5373 and R–5374, consisting of the production and maintenance employees at the Clearwater Unit Plant (Lewiston, Idaho), the Bovill (or Potlatch) Logging Department (Bovill, Idaho), and the Clearwater Logging Department (Headquarters, Idaho). In opposition thereto, the A. F. L. contended that all production and maintenance employees at the five operations of the Company constituted the appropriate unit, basing its contention upon the history of industrial relations of the Company which, since 1941, has bargained with respect to its employees upon the basis of a single company-wide unit. Thereafter, the C. I. O. filed the petition in Case No. 19–R–1164, in which it seeks a unit consisting of all production and maintenance employees of the Company at the five operations, excluding clerical, supervisory, confidential, and temporary employees, as well as employees of Potlach Townsite and Potlash Mercantile Company employees.[11]

but are merely safeguards against the indiscriminate filing of petitions, and are not, therefore, subject to cross-examination. See *Matter of Mill Stores, Inc.*, 39 N. L. R. B. 874; *Matter of Atlas Powder Company*, 43 N. L. R. B. 757.

[11] This unit conforms generally to the unit covered by the contract of June 5, 1941, between the Company and the A. F. L., as amended by the local agreements covering each operation.

The A. F. L. opposed the order directing the consolidation of the proceedings herein upon the ground, *inter alia*, that the employees at the Potlatch Unit Plant (Potlatch, Idaho) and the Rutledge Unit Plant (Coeur D'Alene, Idaho) had no opportunity to establish their bargaining status. This contention is untenable. The A. F. L., as representative of the employees of all five operations of the Company, including those engaged at the Potlatch and Rutledge Unit Plants, until now has conceded no severability in the bargaining status of the employees comprising any one of the several operations now included within the bargaining unit which it currently represents. Consequently, any implication that the bargaining rights or status of the employees at two of the operations is in any way different from that of the remaining employees in the unit would be diametrically opposed to the position that the A. F. L. has constantly maintained herein, and which is evidenced by its bargaining relations with the Company since 1941. Furthermore, the A. F. L. appeared at the hearing on behalf of its locals which represented each of the five divisions of the Company. It is apparent, therefore, that no prejudice can result from any alleged lack of opportunity accorded the employees at the Potlatch and Rutledge Unit Plants to establish their bargaining status.

We are of the opinion that the bargaining history, hereinabove stated, between the Company and the A. F. L. and the latter's various locals clearly indicates the propriety of a single company-wide unit, and we find, therefore, that such

a unit comprised of all production and maintenance employees at the five operations is appropriate.

There remains for consideration certain classifications of employees whose status at the hearing was in dispute.

Store employees: The Company includes within its operations a store located at Bovill, Idaho. The A. F. L. contended at the hearing held in Cases Nos. R–5373 and R–5374 that the employees engaged therein should be included within the unit, whereas, the C. I. O. desired their exclusion. The A. F. L. based its contention upon the fact that these employees were included within the scope of the local contract covering this operation and the additional fact that it bargained with the Company on their behalf. However, the local contract is silent on this point. In any event, we are of the opinion that the interests of these employees are not akin to those of the logging and mill employees, and we shall, therefore, exclude them.[12]

Scalers: The local contract of the Clearwater Logging Department amends the master contract by excluding scalers from the unit; however, both labor organizations desired to include them. Although the Company has classified these employees on its pay roll as clericals, it appears that the interests and duties of scalers[13] are sufficiently

[12] *Matter of Ohio Public Service Co.*, 45 N. L. R. B. 1244; *Matter of Sullivan Drydock & Repair Corp.*, 37 N. L. R. B. 13.

[13] See Dictionary of Occupational Titles, June 1939 Edition, page 561 under Log Scaler (I) and (II).

allied to those of the logging employees to warrant their inclusion within a unit of logging and mill employees. We shall, therefore include them.[14]

Militarized and deputized guards and watchmen: The Company employs several persons in these classifications whom it lists under the general heading of "maintenance," and whom both labor organizations would include within the unit. However, in view of our policy with respect to militarized and deputized employees,[15] we shall exclude these employees from the unit.

We find, therefore, that all production and maintenance employees of the Company at its five operations, including scalers, and railroad employees at the logging operations who are not employees of the Washington-Idaho-Montana Railroad, but excluding all supervisory employees with authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees, or effectively recommend such action, store employees, armed and militarized guards and watchmen, clerical employees, confidential employees, employees of Potlach Mercantile Company,[16] employees of the Townsite Department,[17] foresters,[18] and temporary em-

[14] *Matter of Ewauna Box Company*, 44 N. L. R. B. 1369.

[15] *Matter of Draves Corporation*, 52 N. L. R. B. 322.

[16] These employees were also excluded under the terms of the local contract between the Company and a local of the A. F. L. covering the Potlatch Unit Plant.

[17] See footnote 16, *supra*.

[18] These employees were excluded under the terms of the local contract between the Company and a local of the A. F. L. covering the Clearwater Logging Department.

ployees,[19] constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

V. THE DETERMINATION OF REPRESENTATIVES

We shall direct that the question concerning representation which has arisen be resolved by an election by secret ballot among the employees in the appropriate unit who were employed during the pay-roll period immediately preceding the date of the Direction of Election herein, subject to the limitations and additions set forth in the Direction.

DIRECTION OF ELECTION

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Section 9, of National Labor Relations Board Rules and Regulations—Series 2, as amended, it is hereby

DIRECTED that, as part of the investigation to ascertain representatives for the purposes of collective bargaining with Potlatch Forests, Inc., Lewiston, Idaho, an election by secret ballot shall be conducted as early as possible, but not later than thirty (30) days from the date of this Direction, under the direction and supervision of the Regional Director for the Nineteenth Region, acting in this matter as agent for the National Labor Relations Board, and subject to Article

[19] See *Matter of Crater Lake Box and Lumber Company*, 35 N. L. R. B. 108.

III, Sections 10 and 11, of said Rules and Regulations, among the employees in the unit found appropriate in Section IV, above, who were employed during the pay-roll period immediately preceding the date of this Direction, including employees who did not work during said pay-roll period because they were ill or on vacation or temporarily laid off, and including employees in the armed forces of the United States who present themselves in person at the polls, but excluding those employees who have since quit or been discharged for cause, to determine whether they desire to be represented by International Woodworkers of America, affiliated with the Congress of Industrial Organizations, or by Inland Empire District Council, Lumber & Sawmill Workers Union, affiliated with the American Federation of Labor, for the purposes of collective bargaining, or by neither.

Signed at Washington, D. C., this 14 day of October 1943.

[SEAL]

HARRY A. MILLIS,
Chairman,

GERARD D. REILLY,
Member,

JOHN M. HOUSTON,
Member,

National Labor Relations Board.

In the Matter of POTLATCH FORESTS, INC., *and* LOCALS 10–358 AND 10–361, INTERNATIONAL WOODWORKERS OF AMERICA, AFFILIATED WITH THE C. I. O.

In the Matter of POTLATCH FORESTS, INC. *and* LOCAL 10–364, INTERNATIONAL WOODWORKERS OF AMERICA, AFFILIATED WITH THE C. I. O.

In the Matter of POTLATCH FORESTS, INC. *and* INTERNATIONAL WOODWORKERS OF AMERICA, AFFILIATED WITH THE C. I. O.

Cases Nos. R–5373 (19–R–1058), R–5374 (19–R–1083), 19–R–1164, respectively

[55 N. L. R. B. 255]

SUPPLEMENTAL DECISION

AND

CERTIFICATION OF REPRESENTATIVES

March 4, 1944

On November 9, 10, 11, and 12, 1943, pursuant to the Decision and Direction of Election issued by the Board herein on October 14, 1943,[1] an election by secret ballot was conducted under the direction and supervision of the Regional Director for the Nineteenth Region (Seattle, Washington). On November 15, 1943, the Regional Direc-

[1] 52 N. L. R. B. 1377.

tor issued and duly served upon the parties a Report on Ordered Election.

Said report indicated that of approximately 2,886 voters in the unit, 2,178 cast valid votes, 1,118 of which were cast for International Woodworkers of America, C. I. O., herein called the C. I. O., 953 were cast for Lumber and Sawmill Workers Union, A. F. L., herein called the A. F. L., 21 were cast for neither, 3 were invalid, and 83 were challenged.[2] Since a disposition of the challenged ballots did not affect the results of the election, the Regional Director made no recommendation with respect thereto.

On November 17, 1943, the A. F. L. filed Objections and Exceptions to Election with the Regional Director, alleging that (1) the order directing the election was invalid, since no hearing was afforded by the Board, as required by statute, and since the evidence considered by the Board in ordering the election was, as to the A. F. L., hearsay and *ex parte;* (2) a substantial number of employees of Potlatch Forests, Inc., herein called the Company, who are now in military service, were erroneously excluded from participating in the election because of the method of conducting

[2] In his report, the Regional Director stated with respect to the challenged votes:

"* * * 3 were cast by employees of the Townsite department who were excluded from the unit by the Board's Direction of Election. Forty-four challenged votes were cast by the employees of the Washington-Idaho-Montana railroad, which employees were excluded from the unit by direction of the Board. Of the remaining challenged votes, 36 in number, all challenges were made because it was claimed that the employees were excluded by the terms of the Board's Direction of Election."

said election; (3) the order directing the election excluded railway maintenance employees who are members of the Potlatch local of the A. F. L., a party to the Master Contract between the Company and the A. F. L.; (4) Townsite employees were improperly excluded from participating in the election; and (5) a number of votes were cast by employees added to the Company's pay roll subsequent to the Direction of Election.

On December 28, 1943, the Regional Director issued and duly served upon the parties a Report on Objections, recommending that, since the matters contained in the objections were directed to the Decision and Direction of Election herein, and not to the conduct of the ballot, the objections be overruled.

Thereafter, on January 11, 1944, the A. F. L. filed a motion with the Board, seeking reconsideration of the Decision and Direction of Election herein, vacation of the election conducted pursuant thereto, a stay of certification, and an appropriate hearing. In support of said motion, the A. F. L. contended, in general, that (1) the Decision and Direction of Election was issued without according the A. F. L. a hearing in accordance with its statutory rights in that it was not afforded an opportunity to present evidence with respect to issues not present in the original proceeding,[3] referring specifically to Potlatch Mercantile and Potlatch Townsite employees, and other employees engaged in and about the two operations not involved in that proceeding; (2) no opportunity was accorded the A. F. L.

[3] *Matter of Potlatch Forests, Inc.*, 51 N. L. R. B. 288.

to present evidence with respect to the appropriate pay roll to be used for determination of eligibility, or with respect to the proper times and places for the holding of the election; and (3) the A. F. L. was not given an adequate opportunity to present evidence with respect to (a) the status of Washington-Idaho-Montana railroad employees, (b) the validity of the statement of the Field Examiner in Case No. 19–R–1164, which was considered as part of the record in the Decision and Direction of Election, (c) the status of employees of the Potlatch and Rutledge operations who had entered the armed services of the United States,[4] (d) the impropriety of permitting the participation in the election of employees added to the Company's pay roll between the date of the hearing[5] and the dates of the election, and (e) the nature and status of the contractual relations between the Company and the A. F. L. After due consideration, the Board, on January 27, 1944, issued an Order directing further hearing upon the matters raised in the afore-mentioned objections and motion of the A. F. L., remanding the proceeding to the Regional Director for the purpose of conducting said hearing. Said order further provided that a ruling upon the motion of the A. F. L. would be deferred until the Board

[4] The A. F. L. conceded in its motion that the policy of the Board on the subject is well known, but contended that the representatives of these operations had the right to present evidence and arguments upon this subject in an effort to obtain revision or modification of such policy.

[5] The A. F. L. refers to the hearing conducted pursuant to the original petitions (see footnote 3, *supra*) in this proceeding, which was held on May 14 and 15, 1943.

had reconsidered the entire record, including the evidence to be adduced at the further hearing. The aforesaid hearing was held upon due notice at Lewiston, Idaho, on February 18 and 19, 1944, before Thomas P. Graham, Trial Examiner. The Company, the C. I. O., and the A. F. L. appeared, participated, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. The Trial Examiner's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[6] All parties were afforded an opportunity to file briefs with the Board. The A. F. L. made a request at the hearing, and again subsequent thereto for oral argument before the Board. Said requests are hereby denied.

Upon the entire record in the case, including the Report on Elections, the Objections and Exceptions of the A. F. L., the Report on Objections, the motion of the A. F. L., and the further hearing on said objections and motions, the Board makes the following:

Supplemental Findings of Fact

The principal contention of the A. F. L. is that it was not afforded a proper hearing as provided by the National Labor Relations Act, and the Board's Rules and Regulations. The record in

[6] At the hearing, the A. F. L. sought to introduce several exhibits pertaining to persons employed by the Company who had been inducted into the armed forces of the United States. The Trial Examiner rejected many of these exhibits on the ground that they were cumulative, since he had already received into evidence one such exhibit.

this consolidated proceeding indicates the following sequence of events:

The C. I. O., in its original petitions, had sought to represent the employees of the Bovill, Headquarters, and Lewiston operations of the Company in three separate units.[7] The A. F. L. appeared at the hearing held pursuant to these petitions and was given an opportunity to participate therein. Thereafter, on July 13, 1943, the Board issued a Decision and Order, dismissing the said petitions on the ground that the collective bargaining history between the Company and the A. F. L. clearly indicated the propriety of a single unit composed of all logging and milling employees of the Company.[8] On July 16, 1943, after the issuance of the Decision and Order, the C. I. O. filed a petition[9] in which it sought a unit conforming to that which the Board had indicated as appropriate in its decision. Thereafter, on August 11, 1943, the C. I. O. filed a motion with the Board for an order reopening the original proceedings, amending the petitions therein to conform with its current petition, and directing an election among all employees of the Company without further hearing; in the alternative it moved that the record in the original proceedings be incorporated and made a part of the record in the current one, and that an election be directed thereon. After due consideration of the motion, the Board, on September 14, 1943, issued a Notice to Show Cause why (a) the Decision and Order

[7] Cases Nos. 19–R–1058 (R–5373) and 19–R–1083 (R–5374).

[8] See footnote 3, *supra*.

[9] Case No. 19–R–1164.

previously issued should not be vacated, (b) the original petition reinstated, (c) the new petition should not be made part of the record in the original proceedings and treated as an amendment to the petitions therein, (d) the statement of the Field Examiner in the current proceeding should not be made a part of the record in the original proceedings, (e) a reconsideration of the entire record as thus supplemented should not be made, and (f) a new Decision and Direction of Election should not be issued without further hearing. In answer thereto, the A. F. L. filed a "Protest and Objection to Order of September 14, 1943," contending that the procedure contemplated by the Board was based upon hearsay and is *ex parte* as to the A. F. L., that employees of two operations of the Company not included within the scope of the original petitions filed by the C. I. O. had not been given an opportunity to present evidence on their own behalf, and that the Board had no authority to set aside an existing contract by such proceedings. For reasons stated in the Decision and Direction of Election subsequently issued,[10] the Board found that insufficient cause to the contrary had been shown, and directed an election in accordance with its Notice.[11] As pre-

[10] See footnote 1, *supra*.

[11] The A. F. L. thereupon petitioned the District Court of the United States for the Western District of Washington, Northern Division, to enjoin the Regional Director from holding the election; the Court, however, refused to grant the relief sought on the ground that such action was premature, since the Board had not taken final action in this proceeding. See *Inland Empire District Council* v. *Thomas P. Graham, et al.*, Civil Action, No. 827, issued November 6, 1943, 13 L. R. R. 356.

viously indicated, the C. I. O. obtained a majority of the valid votes cast at said election and the Regional Director so reported.[12] Thereupon the A. F. L. filed Objections to the Election Report and a motion for reconsideration. As indicated hereinabove, the Board remanded the entire proceeding to the Regional Director for the purpose of conducting a further hearing upon the matters contained in said objections and motion.

As stated above, the A. F. L. in substance contends that the Board was not authorized by the Act to order an election without first having held a hearing on the petition of the C. I. O. in Case No. 19-R-1164, and consequently that no certification

[12] The A. F. L. petitioned the Federal District Court for the District of Idaho, Central Division, to enjoin the transmission of the election report by the Regional Director to the Board. This proceeding was dismissed in November 1943, since service upon all the defendants was not obtained. See Local 2766, *Lumber and Sawmill Workers Union, et al.* v. *Essie Hanson*, Civil Action, No. 1553.

The A. F. L. also sought similar relief in the Federal District Court for the Western District of Washington, Northern Division. The Court granted a temporary restraining order on November 19, 1943, but thereafter dismissed the proceeding by order dated December 9, 1943. See *Inland Empire District Council, etc., et al.* v. *T. P. Graham, Jr.*, Civil action, No. 834.

In addition to the foregoing actions, the A. F. L. brought a proceeding in the Federal District Court for the District of Columbia, seeking to set aside all proceedings taken by the Board in this matter, including the Report on Ordered Election. The Court, by order dated December 15, 1943, granted a motion of the Board to dismiss this proceeding on the ground that the relief sought was premature. See *Inland Empire District Council, Lumber and Sawmill Workers Union, et al.* v. *N. L. R. B., et al.*, Civil Action, No. 22353.

can be issued as a result of the election. Assuming *arguendo* that the A. F. L. is correct in contending that the statutory requirement of a hearing was not met by the procedure followed by the Board prior to the election, such procedural defect, if any existed, is cured inasmuch as the Board has since held a hearing on all matters objected to by the A. F. L. and has reconsidered the entire case on the basis of the records made at both hearings. We find therefore that the requirements of an appropriate hearing have been met; the contention of the A. F. L. that it has not been accorded a hearing is accordingly overruled.

The A. F. L. contended in its motion that it had entered upon contractual relations with the Company between the issuance of the Decision and Order,[13] and the Decision and Direction of Election herein,[14] and that it was entitled to present evidence thereon. The Board, accordingly, permitted the A. F. L. at the further hearing to present whatever additional evidence it deemed pertinent to a full disclosure of its contractual relations with the Company.

The record shows that on June 5, 1941, the A. F. L. and the Company executed a master contract, effective June 1, 1941, covering all five milling and logging operations of the Company. The contract provided that in the event "either party to this agreement desires to modify or terminate the agreement, he shall give written notice to the other party at least sixty days in advance of such modification or termination."

[13] See footnote 3, *supra*.

[14] See footnote 1, *supra*.

It further provided that unless the foregoing option to modify or terminate "is exercised by either party at a prior date, the agreement shall automatically terminate one year from the date of the agreement." On May 29, 1942, the Company advised the A. F. L. that "we are willing to renew the present Master Agreement * * * which expires on June 1, 1942, for one year to cover the period from that date to June 1, 1943." On February 16, 1943, the Company notified the A. F. L. in substance that, unless the A. F. L. agreed to eliminate a clause in the master agreement requiring employees to maintain their membership in the A. F. L., "we ask you to accept this as notice of termination of the master agreement as of May 1, 1943." The A. F. L. did not agree to eliminate the clause objected to by the Company, and consequently the contract was terminated, pursuant to the Company's notice, on May 1, 1943. The record shows that no new contract has been entered into by the Company and the A. F. L. After termination of the contract and following numerous proceedings, which it is unnecessary here to relate, before an agency of the National War Labor Board known as the West Coast Lumber Commission, certain orders were issued directing an extension of the contract. It is unnecessary to pass upon the validity of these orders since the last order of the National War Labor Board, dated January 31, 1944, on its face states that the extension is operative only "until a new exclusive bargaining agency is certified by the National Labor Relations Board."

Both in its objections and in its motion, the A. F. L. contended that it was entitled to intro-

duce evidence relating to the status of employees of the Company who had been inducted into the armed forces of the United States. At the further hearing it was permitted to introduce such evidence, the Trial Examiner rejecting only such exhibits as were corroborative of the evidence already introduced. At this hearing, the A. F. L. contended that such persons should have been entitled to participate in the election, and that the Board should have made provision for the balloting of these employees. We have frequently had occasion to pass upon this issue, and, for reasons stated in the *Wilson* Case,[15] find that our customary practice, as set forth in the Direction of Election, was proper.

The A. F. L. contended in its motion that it should have been afforded an opportunity to present evidence with respect to the proper pay roll to be used for the purpose of determining eligibility to participate in the election and with respect to the times and places for the conduct of the election. It further contended, both in its motion and in its objections, that it was not given an opportunity to present evidence indicating the inappropriateness of permitting persons added to the Company's pay roll between May 14, 1943,[16] and November 9, 1943,[17] to participate in the election. Although it was permitted to do so at the further hearing, the A. F. L. presented no evidence sufficient to warrant a disturbance of

[15] *Matter of Wilson & Co., Inc.*, 37 N. L. R. B. 944; see also *Mesta Machinery Company*, 55 N. L. R. B. 59.

[16] The first day of the original hearing in Cases Nos. 19–R–1058 and 19–R–1083.

[17] The first day of the election herein.

our customary finding with respect to eligibility which was made in Section V of the Decision and Direction of Election.

The A. F. L. also contends that the Board considered the statement of the Field Examiner in Case No. 19–R–1164 without permitting any opportunity to point out defects and weaknesses contained therein. For reasons stated in our Decision and Direction of Election, we find this contention to be without merit.[18]

Both in its objections and in its motion, the A. F. L. contended that it had not been given an opportunity to present evidence with respect to the status of employees of the Washington-Idaho-Montana railroad who were excluded from the voting group by the Decision and Direction of Election. At the further hearing, the A. F. L. presented evidence indicating that these employees were represented by its Potlatch local for the purposes of collective bargaining, and took the position, therefore, that they should have been given an opportunity to vote. The evidence adduced at said hearing clearly showed that these employees were employed by a railroad company, which, although a wholly owned subsidiary of the Company herein, is a separate and distinct corporate enterprise. The evidence further showed that these employees are covered by a

[18] In said Decision we stated: "Such statements are based upon Board investigations which are necessarily *ex parte;* they are not offered as final proof of representation, but are merely safeguards against the indiscriminate filing of petitions, and are not, therefore, subject to cross examination. See *Matter of Hill Stores, Inc.*, 39 N. L. R. B. 874; *Matter of Atlas Powder Company*, 43 N. L. R. B. 757.

contract between the Potlatch local of the A. F. L. and the railroad as a distinct unit. Since they are represented under a separate contract and are not employees of the Company, we see no reason for disturbing our previous finding.[19]

The A. F. L. contends that it had not been given an opportunity to present evidence upon the status of Potlatch Townsite and Potlatch Mercantile employees who had been specifically excluded from the voting unit by the Decision and Direction of Election, and, at the further hearing, took the position that these employees should have been included within the voting group. The evidence adduced at said hearing shows that Potlatch Townsite employees are maintenance workers who are concerned primarily with the repair and maintenance of property within the town of Potlatch and that they perform their duties according to a working schedule which differs from that of the logging and milling employees; and that only on rare occasions are they asked to perform maintenance work at the Potlatch Milling operation.[20] Furthermore, the subsidiary contract between the Potlatch local of the A. F. L. and the Potlatch operation of the Company[21] specifically excludes

[19] It is unnecessary to pass upon the question whether the railroad company is subject to the Railway Labor Act and hence not an employer within the meaning of Section 2 (2) of the Act.

[20] The record discloses that there is a separate maintenance crew attached to the mill which ordinarily takes care of the maintenance work of the mill.

[21] The master contract of June 5, 1941, specifically provides for the execution of subsidiary contracts between each of the five operations of the Company and the locals of the

these employees from the unit, as well as the Potlatch Mercantile employees. With respect to the latter group, the record indicates that these employees are engaged by and receive a salary from the Potlatch Mercantile Company,[22] and their duties are confined to the store which the Merchantile Company operates. In view of the foregoing we see no reason for disturbing our prior finding with respect to these groups.

Although the issue was not specifically raised in either its motion or objections, the A. F. L. presented evidence at the further hearing which showed that watchmen and guards of the Company, although previously militarized and under the jurisdiction of the United States Army, have, since January 10, 1944, been demilitarized. The evidence at said hearing further indicates the watchmen, at least, are still deputized by the county. We see no reason, therefore, to disturb the finding made in our Decision and Direction of Election, and we shall specifically exclude deputized as well as militarized guards and watchmen.

We find that the objections of the A. F. L. raise no substantial or material issue with respect to the conduct of the ballot or to the Report on Ordered Election, and we therefore overrule them. Furthermore, in view of our discussion hereinabove, we see no reason for disturbing our previous Decision and Direction of Election. Ac-

A. F. L. at these operations. These subsidiary contracts contain provisions applicable to the circumstances presented at the particular operation covered thereby.

[22] The Company's employees are hourly paid.

cordingly, we shall certify the C. I. O. as the exclusive representative of the employees in the appropriate unit.

CERTIFICATION OF REPRESENTATIVES

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Sections 9 and 10, of National Labor Relations Board Rules and Regulations—Series 3,

IT IS HEREBY CERTIFIED that International Woodworkers of America, affiliated with the Congress of Industrial Organizations, has been designated and selected by a majority of all production and maintenance employees of Potlatch Forests, Inc., Lewiston, Idaho, at its five operations, including scalers, and railroad employees at the logging operations who are not employees of the Washington-Idaho-Montana railroad, but excluding all supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees; or effectively recommend such action, store employees, militarized or deputized guards and watchmen, clerical employees, confidential employees, employees of Potlatch Mercantile Company, employees of the Townsite Department, foresters, and temporary employees, as their representatives for the purposes of collective bargaining, and that, pursuant to Section 9 (a) of the Act, International Woodworkers of America, affiliated with the Congress of Industrial Organizations, is the exclusive representative of all such employees for the pur-

poses of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

Signed at Washington, D. C., this 4th day of March 1944.

[SEAL]

HARRY A. MILLIS,
Chairman,
GERARD D. REILLY,
Member,
JOHN M. HOUSTON,
Member,
National Labor Relations Board.

APPENDIX B

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

SEC. 3. (b) * * * The Board shall have an official seal which shall be judicially noticed.

* * * * *

SEC. 8. It shall be an unfair labor practice for an employer—

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. * * *

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of

such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect. * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. * * * Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and en-

ter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

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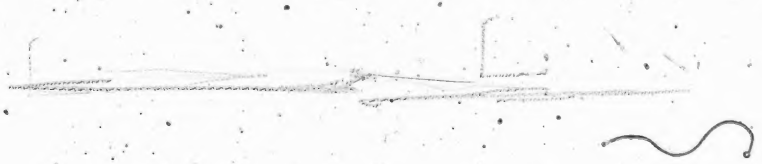

SUPREME COURT OF THE UNITED STATES.

No. 613.—October Term, 1944.

Inland Empire District Council, Lumber and Sawmill Workers Union, Lewiston, Idaho, et al., Petitioners, vs. Harry A. Millis, Individually and as Chairman and Member of the National Labor Relations Board, et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[June 11, 1945.]

Mr. Justice Rutledge delivered the opinion of the Court.

This controversy grows out of a contest between rival labor unions over the right to act as collective bargaining representative of employees of Potlatch Forest, Inc., a company conducting logging, lumbering and milling operations in northern Idaho. Petitioners seek relief from a certification order of the National Labor Relations Board issued pursuant to § 9(c) of the National Labor Relations Act. 49 Stat. 453; 29 U. S. C. § 159(c). They are affiliated with the American Federation of Labor, the certified union with the Congress of Industrial Organizations.

In *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, this Court held that a certification under § 9(c) is not reviewable by the special statutory procedure except incidentally to review of orders restraining unfair labor practices under § 10. Decision was expressly reserved whether, apart from such proceedings, review of certification may be had by an independent suit brought pursuant to § 24 of the Judicial Code. 308 U. S. 412.

Petitioners now assert the right to such review. Prior to the certification, they had represented the company's employees in collective bargaining. They do not seek review upon the merits of the certification. Their claim is that they were denied the "appropriate hearing" which § 9(c) requires and that the effect was not only to deprive them of the statutory right to hearing but also to deny them due process of law contrary to the Fifth

Amendment's guaranty. Accordingly they seek, in substance, injunctive relief requiring respondents, members of the Board, to vacate the order of certification or, in the alternative, a declaratory judgment that the order is invalid.

The District Court declined to dismiss the suit, upon respondents' motion alleging, among other grounds, that the court was without jurisdiction of the subject matter. The Court of Appeals reversed the judgment, one judge dissenting. 144 F. 2d 539. That court held that the statutory review is exclusive, with the consequence that this suit cannot be maintained. The obvious importance of the decision caused us to grant the petition for certiorari.[1] — U. S. —.

In *American Federation of Labor* v. *National Labor Relations Board*, 312 U. S. at 412, the Court said, with reference to the question whether the Wagner Act has excluded judicial review of certification under § 9(c) by an independent suit brought under § 24 of the Judicial Code:

> It can be appropriately answered only upon a showing in such a suit that unlawful action of the Board has inflicted an injury on the petitioners for which the law, apart from the review provisions of the Wagner Act, affords a remedy.

Petitioners earnestly urge that this case presents the required showing of unlawful action by the Board and resulting injury. Unless they are right in this view, it would be inappropriate, as was said in the *American Federation of Labor* case, to determine the question of reviewability. That question should not be decided in the absence of some showing that the Board has acted

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[1] The inferior courts have divided on the question. Compare Association of Petroleum Workers v. Millis, No. 20854 (N. D. Ohio), unreported; Sub Ship Employees Association, Inc. v. National Labor Relations Board, 139 F. 2d 744 (C. C. A. 3); International Brotherhood of Electrical Workers v. National Labor Relations Board, No. 21994 (N. D. Ohio), unreported; American Broach Employees Association v. National Labor Relations Board, No. 4242 (E. D. Mich.), unreported; Spokane Aluminum Trades Council v. National Labor Relations Board, No. 349 (E. D. Wash.), unreported; with International Brotherhood of Electrical Workers v. National Labor Relations Board, 41 F. Supp. 57 (E. D. Mich.); American Federation of Labor v. Madden, 33 F. Supp. 943 (D. D. C.); Klein v. Herrick, 41 F. Supp. 417 (S. D. N. Y.); R. J. Reynolds Employees Association, Inc. v. National Labor Relations Board (M. D. N. C.), unreported; Reilly v. Millis, 52 F. Supp. 172 (D. D. C.), affirmed, 144 F. 2d 259 (App. D. C.); The Brotherhood and Union of Transit Employees of Baltimore v. Madden, 15 L. R. R. 519 (D. Md.), reversed, 15 L. R. R. 806; Inland Empire District Council Lumber & Sawmill Workers Union v. Graham, 53 F. Supp. 369 (W. D. Wash.).

unlawfully. Upon the facts presented, we think no such showing has been made, whether by way of departure from statutory requirements or from those of due process of law.

On March 9, 1943, local unions affiliated with the C. I. O. filed petitions with the Board for certification as bargaining representatives in three of the company's five logging and milling plants or units.[2] The plants were geographically separate. Some were located as far from others as one hundred miles. But there was common ownership, management and control, with occasional shifting of crews or men from one plant to another.[2] Although the petitions sought separate local units rather than a single company-wide unit, the Board consolidated them for hearing before a trial examiner.

The hearing was held in May, 1943. The company, the C. I. O., and the petitioners, who may be referred to collectively as the A. F. of L.,[3] appeared and participated. No complaint is made concerning this hearing. It was apparently a typical representation proceeding. The principal issue was the character of the appropriate unit. The A. F. of L. urged that the unit should be company-wide. The C. I. O. advocated separate plant units.

The Board's decision was rendered July 13, 1943. 51 N. L. R. B. 288. It found that the A. F. of L. had organized the employees on a company-wide basis and on this basis had made a "master contract" with the company, which however was supplemented by local contracts relating to local matters in each of the five operations. The Board concluded that the history of the bargaining relations had demonstrated the appropriateness of a unit consisting of all the logging and mill employees of the company. It therefore dismissed the petitions of the C. I. O. on the ground that the three separate plant units sought were inappropriate.

Three days later, on July 16, the C. I. O. filed a further petition, this time asking to be certified as bargaining representative on a company-wide basis, excluding clerical, supervisory, confidential,

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[2] Some special operations, e. g., the Washington-Idaho-Montana Railroad, were conducted through wholly owned subsidiaries.

[3] The collective designation is appropriate both for convenience and by reason of the facts noted in the text, relating to A. F. of L.'s dealings with the company through both a "master contract" and local supplemental agreements.

and temporary employees, as well as employees of Potlatch Townsite and Potlatch Mercantile Company.[4] The unit thus suggested conformed generally to the one covered by the outstanding A. F. of L. contract.

On September 14, pursuant to C. I. O.'s motion, the Board served notice upon the A. F. of L. to show cause why the decision of July 13 should not be vacated; the petitions in the earlier cases reinstated and treated as amended by the new petition; and why the Board should not reconsider and proceed to decision without further hearing. The order also proposed to make part of the record the statement of the Board's field examiner concerning the C. I. O. claims of authorization to represent employees.[5]

The A. F. of L. responded by filing a "Protest and Objection." This alleged that the proposed order contemplated a decision without the taking of evidence, to be based in part on an ex parte survey of C. I. O. claims of authorization by employees; that employees of the two units not involved in the first proceeding would have no opportunity to present evidence in their own behalf;[6] and that the Board had no authority to set aside the A. F. of L.'s existing contract by such proceedings.

The Board considered the objections, but found them insufficient, rejected the protest and, without further hearing for the taking of evidence, considered the case upon the full record, including that made in the original hearings. It again approved a company-wide unit, following the historical lines of organization, but excluded certain "fringe" classifications in conformity with generally established policy. It further found that a question concerning representation had arisen and directed that an election be held among the employees in the appropriate unit as it had been determined. The Board's decision was rendered October 14, 1943. 52 N. L. R. B. 1377.

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[4] The Board's report shows that employees of these operations had been excluded from the units in the local contracts which the A. F. of L. had with the separate operations of the company. 52 N. L. R. B. 1377, 1382-1383.

[5] The field examiner's report is introduced, not as proof of the extent of representation by the petitioning union, but to satisfy the Board that there is a substantial membership among the employees in the unit claimed to be appropriate sufficient to justify the Board's investigation.

[6] These were the plants located at Potlatch and Coeur d'Alene, which were not included in the units sought by the C. I. O. in its original petitions.

The election was held during the following November and resulted in a majority for the C. I. O.[7] The A. F. of L. filed "Objections and Exceptions to Election," see 55 N. L. R. B. 255, 256, which renewed the claim of impropriety in failing to hold another hearing and also challenged some exclusions of employees from eligibility to take part in the election. Accordingly the A. F. of L. moved to vacate the decision and direction of election, to vacate the election itself, to stay certification and to grant an appropriate hearing.

In January, 1944, the Board granted the A. F. of L.'s motion for further hearing, but deferred ruling upon the request to vacate the previous decision and the election. The hearing was held before a trial examiner in February, 1944. Petitioners appeared and participated fully, as did the company and the C. I. O. No complaint is made concerning the scope of this hearing or the manner in which it was conducted, except as to its timing in relation to the election. Full opportunity was afforded petitioners to present objections and evidence in support of them. From the absence of contrary allegation, as well as the official report of the Board's decision, it must be taken that all available objections to the Board's procedure and action were made, considered, and determined adversely to petitioners.[8]

The Board rendered its supplemental decision on March 4, 1944. 55 N. L. R. B. 255. This made supplemental findings of fact based upon the entire record, including the record in the original proceedings, the election report, petitioners' objections and exceptions, the motion for reconsideration, and the evidence and objections taken at the February hearing. After reviewing the entire proceedings, the Board found that an "appropriate hearing" had been given, within the requirement of § 9(c); ruled upon each of petitioners' objections, whether new or renewed; and concluded that none of them furnished adequate reason for disturbing its previous decision and direction for election. Accordingly it denied the motion to vacate that decision and the election, and certified the C. I. O. as exclusive bargaining representative of the employees in the unit found appropriate. A. F. of L.'s further

[7] The majority was of the ballots cast, but not of the total number of employees eligible to vote.

[8] Cf. 55 N. L. R. B. 255.

motion for reconsideration was denied and thereafter the present suit was instituted.[9]

Upon this history petitioners say they have been denied the "appropriate hearing" §9(c) requires. They insist that the hearing, to be "appropriate," must precede the election. According, the February, 1944, hearing is said to be inadequate to satisfy the statutory requirement, as well as due process, although no complaint is made concerning its adequacy in any respect other than that it followed, rather than preceded, the election.

Petitioners urge also that the procedure was unwarranted for the Board to vacate the decision of July, 1943, reopen or "reinstate" the original proceedings, treat the C. I. O.'s petition for company-wide certification as an amendment to its original petitions, and thereafter to regard the record in the earlier proceedings as part of the record in the later ones, together with the field examiner's report concerning C. I. O. employee representation.

Petitioners' exact contention concerning the reopening of the original proceedings is not altogether clear.[10] But, in any event, it clearly maintains that the Board's action, in effect treating the later proceedings as a continuance of the earlier ones, injected new issues upon which petitioners were entitled to present additional evidence. Accordingly it is claimed that the original record, together with the additional matter presented by the new petition, the motions which followed and the proceeding to show cause, was not adequate to sustain the Board's action in vacating its first decision and entering the direction for election. Although petitioners urge that the preelection proceedings were defective, they emphasize most strongly that the February hearing could not cure the failure to grant the further hearing they demanded prior to the election.

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[9] The suit is the last in a series intended to prevent the holding of the election or to avoid certification founded upon it. See Inland Empire District Council v. Graham, 53 F. Supp. 369 (W. D. Wash.); Local 2766, Lumber and Sawmill Workers Union v. Hanson, Civil Action, No. 1553 (D. Idaho), unreported; Inland Empire District Council v. Graham, Civil Action No. 834 (W. D. Wash.), unreported; Inland Empire District Council v. National Labor Relations Board, Civil Action No. 22353 (D. D. C.), unreported.

[10] The argument appears to regard them as irrevocably closed by the decision of July 13, 1943, and that decision as endowed with finality precluding the Board from later reopening the proceedings and considering further the record made in them. It seems also to suggest that the original petitions could not be amended, at any rate by treating the later petition as an amendment, after the decision, notwithstanding an order vacating it.

The Board's position is, in effect, twofold, that there was no departure from the statute's requirements or those of due process in the proceedings prior to the election;[11] and, if they were defective in any respect, the departure was cured by the full hearing granted at petitioners' insistence after the election.

We think petitioners have misconceived the effects of § 9(c). It is as follows:

> Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. *In any such investigation*, the Board shall provide for an *appropriate hearing upon due notice*, either in conjunction with a proceeding under section 10 or otherwise, and *may* take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives. (Emphasis added.)

The section is short. Its terms are broad and general. Its only requirements concerning the hearing are three. It must be "upon due notice," it must be "appropriate," and it is mandatory "in any such investigation," but may be held in conjunction with a § 10 (unfair practice) proceeding or otherwise.

Obviously great latitude concerning procedural details is contemplated. Requirements of formality and rigidity are altogether lacking. The notice must be "due," the hearing "appropriate."

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[11] The Board says that the two proceedings involved the same substantial controversy, namely, representation of the Potlatch Company's employees; and therefore the material issues were the same except that in the later proceedings the C. I. O. acceded to the decision that a company-wide unit was appropriate and sought representation on that basis. Only a waste of time and money for all concerned would have resulted, in the Board's view, from retracing the ground covered in the earlier hearings. Accordingly, it was entirely proper to treat the later ones as in substance a continuation of them and to proceed with the determination of the other questions relating to representation which the narrow ground of the first decision had made unnecessary to decide.

The Board also maintains that a further hearing was not required in the absence of a showing by petitioners that new issues were presented which required the taking of additional evidence. In its view the procedure, to show cause afforded adequate opportunity for petitioners to do this and none of the issues they presented furnished adequate basis either to require holding a further hearing or for refusing to proceed with the election upon the basis proposed.

The Board and the petitioners are at odds therefore concerning the materiality of the issues presented on the show cause procedure and their sufficiency to require further hearing for the presentation of evidence. But, in any event, the Board says that if it was wrong as to this in any respect the error was cured by the full hearing allowed in February, 1944.

These requirements are related to the character of the proceeding of which the hearing is only a part. That proceeding is not technical. It is an "investigation," essentially informal, not adversary. The investigation is not required to take any particular form or confined to the hearing. The hearing is mandatory—"the Board *shall* provide for" it. But the requirement is only that it shall be provided "in any such investigation." The statute does not purport to specify when or at what stage of the investigation the hearing shall be had. It may be conducted "in conjunction with a proceeding under section 10 or otherwise."

Moreover, nothing in the section purports to require a hearing before an election. Nothing in fact requires an election. The hearing "in any such investigation" is mandatory. But the election is discretionary. The Board "*may* take a secret ballot . . . or utilize any other suitable method to ascertain such representatives."

An election, when held, is only a preliminary determination of fact. Sen. Rep. No. 573, 74th Cong., 1st Sess., 5-6; H. R. Rep. No. 1147, 74th Cong., 1st Sess., 6-7. A direction of election is but an intermediate step in the investigation, with certification as the final and effective action. *National Labor Relations Board* v. *International Brotherhood of Electrical Workers*, 308 U. S. 413, 414–415. Nothing in § 9(c) requires the Board to utilize the results of an election or forbids it to disregard them and utilize other suitable methods.

It hardly can be taken, in view of all these considerations, that Congress intended a hearing which it made mandatory "in any such investigation" always to precede an election which it made discretionary for all and which, in the committee reports, it specifically denominated as only a method for making a preliminary determination of fact. That characterization was not beyond congressional authority to make and is wholly consistent with the discretionary status the section gives that mode of determination.

In view of the preliminary and factual function of an election, we cannot agree with petitioners' view that only a hearing prior to an election can be "appropriate" within the section's meaning. The conclusive act of decision, in the investigation, is the certification. Until it is taken, what precedes is preliminary and tentative. The Board is free to hold an election or utilize other suit-

able methods. Such other methods are often employed and frequently are of an informal character. Petitioners' view logically would require the hearing to be held in advance of the use of any such other method as much as when the method of election is used.

Congress was fully informed concerning the effects of mandatory hearings preceding elections upon the process of certification. For under Public Resolution 44, which preceded § 9(c), the right of judicial hearing was provided. The legislative reports cited above show that this resulted in preventing a single certification after nearly a year of the resolution's operation and that one purpose of adopting the different provisions of the Wagner Act was to avoid these consequences.[12] In doing so Congress accomplished its purpose not only by denying the right of judicial review at that stage but also by conferring broad discretion upon the Board as to the hearing which § 9(c) required before certification.

Petitioners' argument does not in terms undertake to rewrite the statute. But the effect would be to make it read as if the words "appropriate . . . in any such investigation" were replaced with the words "hearing prior to any election." Neither the language of the section nor the legislative history discloses an intent to give the word "appropriate" such an effect. We think the statutory purpose rather is to provide for a hearing in which interested parties shall have full and adequate opportunity to present their objections before the Board concludes its investigation and makes its effective determination by the order of certification.

In this case that opportunity was afforded to petitioners. We need not decide whether the hearing would have been adequate or "appropriate," if the February, 1944, hearing had not been granted and held. In the Board's view, petitioners, when afforded the opportunity in the proceedings to show cause held prior to the election, brought forward nothing which required it to hold a further hearing for the taking of evidence. With this petitioners disagree. We need not examine whether one or the other was correct in its view. For when the objections were renewed after the election, and others also were advanced, the Board gave

[12] Cf. note 9.

full and adequate opportunity for hearing, including the presentation of evidence, concerning them. Petitioners do not contend that the hearing was a sham or that the Board did not consider their objections. They do not ask for review upon the merits. Their only objection is that the hearing came too late. That objection is not tenable in view of the statute's terms and intent.

It may be, as petitioners insist, that their interests were harmfully affected by the outcome of the election, through loss of prestige and in other ways. It does not follow that the injury is attributable to any failure of the Board to afford a hearing which was "appropriate" within the section's meaning. This being true, and since petitioners do not now question the Board's rulings upon the merits of the issues apart from those relating to the character of the hearing, the injury must be regarded, for presently material purposes, as an inevitable result of losing an election which was properly conducted.

Petitioners also assert that the Board departed from its own rules in failing to accord them the hearing demanded prior to the election. The regulations provide for direction of election to follow the hearing before the trial examiner and, in the Board's discretion, oral argument or further hearing as it may determine. Rules and Regulations, Art. III, §§ 3, 8, 9. But the regulations also contemplate further hearings for reconsideration before the final act of certification, a procedure of which petitioners had full advantage in this case. Whether or not the hearings provided before the election were adequate to comply with the regulations, the procedure upon rehearing afterward was adequate to perform its intended function of affording full opportunity for correcting any defect which may have existed in the previous stages of hearing.[13]

We think no substantial question of due process is presented. The requirements imposed by that guaranty are not technical, nor is any particular form of procedure necessary. *Morgan* v. *United States*, 298 U. S. 468, 481. "The demands of due process do not

[13] We need not determine whether in a situation where no hearing whatever is afforded prior to an election, the failure would be cured by allowing one afterward, whether as a matter of compliance with the statute or with the regulations. That situation is not presented. The proceedings in this case prior to the election afforded opportunity for hearing. At most the hearing was defective, and the opportunity given by the postelection hearing was effective to cure whatever defects may have existed, if any.

require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective." *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 152, 153; cf. *Bowles* v. *Willingham*, 321 U. S. 503, 519-521.[14] That requirement was fully met in this case.

The judgment is

Affirmed.

Mr. Justice ROBERTS dissents.

[14] Cf. also Buttfield v. Stranahan, 192 U. S. 470, 496-497; National Labor Relations Board v. Mackay Radio & Tel. Co., 304 U. S. 333, 350, 351; Anniston Mfg. Co. v. Davis, 301 U. S. 337, 342, 343; United States v. Ju Toy, 198 U. S. 253, 263; C. B. & Q. Railroad v. Chicago, 166 U. S. 226, 235; Phillips v. Commissioner of Internal Revenue, 283 U. S. 589, 596-597.